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A  
✓ COMPENDIOUS VIEW  
OF  
THE CIVIL LAW,  
AND OF  
THE LAW OF THE ADMIRALTY,  
BEING THE SUBSTANCE OF  
**A Course of Lectures**  
READ IN THE  
**UNIVERSITY OF DUBLIN,**

BY  
ARTHUR BROWNE, LL.D. S.F.T.C.D.  
PROFESSOR OF CIVIL LAW IN THAT UNIVERSITY, AND REPRESENTATIVE IN THREE PARLIAMENTS FOR THE SAME.

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FIRST AMERICAN FROM THE SECOND LONDON EDITION, WITH GREAT ADDITIONS.

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VOL. II.  
CONTAINING THE VIEW OF THE ADMIRALTY LAW.

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*W. F. Gibson*  
New York:  
HALSTED AND VOORHIES, LAW BOOKSELLERS,  
CORNER OF NASSAU AND CEDAR STREETS.

.....  
1840.

LETTER TO THE EDITOR

57,714

*Handwritten signature*  
E. M. ...  
Brookfield, Mass.

TO  
THE RIGHT HONOURABLE  
SIR WILLIAM SCOTT, KNT.  
JUDGE OF THE HIGH COURT OF ADMIRALTY,  
&c. &c. &c.  
WHOSE SUPERIOR KNOWLEDGE  
AND UNRIVALLED ADMINISTRATION  
OF  
THE CIVIL LAW,  
AND  
OF THE LAW OF NATIONS,  
WHILE THEY REFLECT THE BRIGHTEST  
LUSTRE ON THOSE SCIENCES,  
PROVE, BEYOND ALL OTHER EXAMPLES,  
THEIR GREAT UTILITY,  
THIS WORK IS  
MOST HUMBLY DEDICATED,  
BY HIS  
VERY OBEDIENT SERVANT,  
THE AUTHOR.



# P R E F A C E

TO THE

## S E C O N D V O L U M E.

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IT is a remarkable truth, that while these countries have been super-eminently conspicuous in naval grandeur, power and importance, and the law which governs the courts of admiralty proportionably interesting, no general elementary treatise upon that subject has appeared for more than a century. Those of Exton, Zouch, and Godolphin, learned and able as they are, were composed while the contests between the courts of common law and admiralty were at their height, and the limits of the jurisdiction of the latter totally unsettled. To shew that they still are not altogether settled by the rules of right reason, is one object of the present treatise; but

certainly many points have been ascertained since the publication of the works above mentioned, and the extent to which the courts of law claim the right of issuing prohibitions is now pretty well known. The law of nations also, and its application to the modern controversies of belligerent and neutral powers, is better understood; and though, upon some detached points, able and celebrated essays have appeared, yet every circumstance of the times has called for systematic and general instruction. The confined limits of the present volume, as of the former, disavow however and forbid the idea of detailed and minute information. They profess rather to guide research, to refer where they do not inform, and to mark the great sources of the law of the admiralty in the civil law.

If the author should be deemed even less successful in the attempt, the attempt has merit as prompting by example, and that so far the plan is useful can scarcely be denied. The work is of course, in some respects, a compilation; but the author has not servilely compiled, nor hesitated to intermix freely his own opinions and reflections; and while he means to speak mo-

destly, would not wish that feeling, as too often happens, to be mistaken for timidity. The propriety of annexing this work to a treatise on the civil law is evident.

Since the work was finished, the author has seen some new cases, particularly the celebrated one of the *Gratitudine*, in December, 1801, and some new and able works on marine law; but he doth not think that these cases have controverted his positions, nor these works anticipated his design, though of the latter he had at first that mortifying apprehension to which every man is subject, during the pendency of his labours.



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## INTRODUCTORY CHAPTER.

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### OF THE LAW OF NATIONS.

To treat of the law of nations may, on the first view, seem foreign to the duty of a professor of civil law, the affinity of whose studies might however plead his excuse in an university not endowed with a professorship of the law of nature and nations. But his apology has been already made in a prælection, whose subject was the utility of the study of the civil law, marking, among other observations, the surprising degree in which the law of Rome had interwoven itself with the law of the world, and become the handmaid to its illustration.

In the execution of this plan, clearness and precision must be my principal objects, before which all attention to studied phrase and brilliant period, little congenial to tracts of the didactic kind, must necessarily bow.

On the very threshold of this structure, a question may probably occur to juvenile enquiry, What means the law of nations? How can there be a law between independent states? What is the obligation to it? Where its sanction? Where the penalties of its violation? We have not in Europe, or in the world, a general amphictyonic council, the arbiter of states, which may ultimately decide their appeals, and denounce the terrors of universal war on the children of disobedience? The answer to this apparently formidable objection, is found in the reflection, that the law of nations is originally no more than the law of nature applied to nations(1). It has then the sanction, the obligation, the immutability of the law of nature; it is properly a law with all its requisites, characteristics, and concomitants. Why then is it distinguished from the law of nature? Why rendered the subject of separate consideration, and several discussion?

In their reply to this latter question, writers are by no means unanimous, and I shall venture, with all humility, to propose an opinion not perfectly coinciding with any I have found in books.

(1) Vattel therefore very justly entitles his book, *The Law of Nations, or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns.*

The distinction was never made till the time of Ulpian, nor are the discriminations of the Roman jurists on this head accurate or uniform. Justinian defines the law of nature to be, *Quod natura omnia animalia docuit*, and the law of nations, *Quod naturalis ratio apud omnes homines constituit*; and though in the next paragraph the emperor has with more precision described *Jus Gentium* to be that *Quod omni humano generi commune est, nam usu exigente & humanis necessitatibus, gentes humanæ jura quædam sibi constituerint*, and instances the case of captivity founded in the right of war, and contrary to natural equality; yet it appears by the context, that his general view extended only to those maxims of equity, which being founded in the nature of things are universally applicable to individuals of different countries, and not to the laws mutually obligatory upon integral national communities.

But, if the ancients distinguished these laws imperfectly, the moderns did not, till of late, distinguish them at all. Hobbes, whose abilities at least will not be denied, treats of the *Jus Gentium* merely as part of the law of nature; and the great Puffendorff has no where granted it a separate discussion. Their method was founded in an opinion condemned as false by more recent writers, that the maxims of the law of nature applied to states, were the same with its regulations applied to persons, expressly averring that

the law of nature, when applied to nations, can suffer no necessary change; that the duties of states and individuals are the same. Barbeyrack allows a variance, yet condemns division of the subjects. It was reserved for the baron de Wolfius, of Hall, a German philosopher, (whose merits far exceed his fame, and whose voluminous works, though tinged with the laborious prolixity characteristic of his nation, are replete with sound learning, and the offspring of profound meditation) it was, I say, his glory, clearly to establish the boundaries of these different codes. He first insisted, that the diversity which takes place in the application of the law of nature to states and individuals formed such entirely different codes of duties and rights, as made it utterly improper to blend them in the same treatise, or apply to them similar maxims. His disciple Vattell (whose compendious work, by its clear conciseness, is peculiarly adapted to common use) adopts the doctrine, and acknowledges the master; yet deviates in the mode of establishing the foundations of national jurisprudence, deducing the idea from natural liberty and common interest, while Wolfius has recourse to an imaginary universal republic.

Coinciding with them on the propriety of distinct consideration, I must, with all humility, beg leave to differ as to the reasons on which it is founded.

The law of nature, say they, is rightly in common parlance confined to individuals, their rights and obligations, because the decrees of natural jurisprudence between state and state frequently vary from its injunctions between man and man, since a particular rule, perfectly just when applied to one subject, viz. an individual, may be totally improper in its application to a nation, a subject of a very different nature.

If these foreign jurists mean to speak of man in civil society, it is true; but if of man in a state of nature, which is necessary to their position, I find myself obliged to agree with our countryman Hobbes, that the law of nature, when applied to nations, can suffer no necessary change. I speak here of the necessary law of nations, for as to the positive, that is not the law of nature, but the law of compact expressed or implied, and certainly may vary from the law of nature. Nor do I recollect an instance adduced by Wolfius or Vattell of such diversity. Both of them distinguish the imperfect from the perfect rights of nations, and determine the incompetency of one independent state to prescribe to another; the criminality of communities, their violations of the law of Heaven implanted in their hearts, are cognizable by no foreign tribunal and liable to no exterior sanction, while injurious merely to themselves and innoxious to their neighbours. And even though pernicious to sur-

rounding powers, if merely offences against national equity, merely refusals to attend to imperfect rights, they are not subjects of resentment, restitution, or punishment. Denial of the offices of humanity, of corn, of stores, of supplies, calls not for vengeance on the uncomplying country, the sole judge of its propriety, and arbiter of its necessity.

But do not all these principles apply to men in their private capacity?—do not imperfect rights, as well as perfect, appertain to individuals? Has any man in a state of nature authority to enforce his imperfect rights by violence, or to controul the actions of another in no manner affecting his own? No foreign nation can justly interfere in the plans of municipal system, nor individual stranger in the regulation of patriarchal dominion.

Again, they have taken much pains to explain the nature of national falsehood, as discriminated from hostile deception, and to subdistinguish justifiable deception from intolerable fraud.

The king, whose secretary, detected in perfidious correspondence with the foe, was compelled to write dispatches ensnaring the enemy to his ruin, has reaped applause; while the ship, which by holding out signals of distress inveigled the foe to his capture, has been justly reprobated, as

damping that charity which is sacred to the interests of mankind.

The cases cannot happen in civil society, but surely in natural, if hostilities commenced between man and man, the same rules would qualify justifiable stratagem, and condemn unauthorized deception.

These then are not the reasons of classing the law of nations as a particular science ; the real cause in my judgment is, that *numberless cases* arise *peculiar* to nations, and not incident to individuals, and therefore making a separate science and requiring a several discussion ; not that the *same* cases applied to both are regulated or decided in a different manner ; and the necessity of distinction depends on the importance and variety of situations, confined and peculiar to great communities alone, and also upon the existence of a voluntary or positive law among nations.

Having now shewn the grounds on which late writers found the distinction between the law of nature and nations, and those on which it appears to me to rest ; method would lead me in regular order to delineate the various branches and divisions of this law, and give a general and distinct chart of the immense dominions subject to its sway. But let me pause a moment, to obviate an objection which probably has, by this time,

arrested the mind of the auditor, especially as in so doing, the advantage of example may rouse the attention of the disciple, and demonstrate the utility of the science. The objection is, to the magnified eulogiums of theorists on its importance, and their declamations on its difficulty.

If it be merely the law of nature, it may be said, that law which reason and Providence have implanted in the human mind, the eye of conscience will instantly discern the rays of justice, in whatever direction they are emitted. Behold the common topic of satire and ridicule, with the ignorant and unthinking, on those whose peculiar province it is to develope truth in her sanctuary. No! the majesty of justice often sits enthroned in a secret temple, accessible to few votaries. Reason is given to correct first impressions, but does not proffer the instant discovery of involved and perplexed propositions.

In the subject of our present consideration, nothing can more fully shew the inherent difficulties, than the monstrous absurdities of many, even of its most illustrious professors. Can there be a more extravagant idea to any man acquainted with the true foundations of government and succession, than a testamentary right in princes to bequeath the sceptre, however Elizabeth or Peter may have exercised the power *de facto*? Yet it has been justified and supported by the ablest

writers, and amongst others, by that very Wolfius of whom we have spoken. Can we conceive a more horrible principle, than the contradictory of that law of war, which prohibits poisoned weapons, the infecting of springs, murder of an enemy by poison or assassination, the unnecessary multiplication of the evils of war, or the adoption of acts destructive of human society? We might have hoped that the authority of Grotius, the oracle of sound policy and common sense, would for ever have silenced the impious tongue that could propose such horrors. We might have hoped, that the glory ascribed by Tacitus to the Romans, *non fraude, neque occultis, sed palam & armatum, populum Romanum hostes suos ulcisci*, would have been envied by all posterity. Yet such doctrines are not altogether strangers to the celebrated philosopher of Hall; and the representatives of an enlightened nation(2), at a very late period indeed, endured their mention without indignation or abhorrence.

The disputes about *Mare clausum & liberum*, engrossed, in the last century, the attention of all Europe. They were occasioned by the claim of the English to the dominion of the neighbouring seas, even as far as the opposite coasts; a claim which could have been founded only in treaty,

(2) The French, whose rulers at one time took into consideration the propriety of employing assassins.

and if it rested merely on use, was supported solely by power ; the licence of Britain was the sole key to the navigation of those seas ; the claim was extravagant as it was haughty ; the sea, at least out of cannon shot of the coasts, is common to all : yet it was supported by the learned Selden, and required at that time confutation from the able pens of Grotius and Bynkershoek. I do not mean to impeach that dominion of the sea, and respect demanded by the British flag, which particular treaties concede, or which the general consent of European nations grants in the four seas to the undisputed superiority of the naval power of Britain.

These are questions of obvious solution ; but it would be easy to point out many others of more difficulty, on which the decisions of this law might teach the student to tread more warily on similar grounds, where youth is sometimes tempted to plant a hasty and presumptuous step.

No question has been more agitated than the right of searching neutral ships trading with the enemy. All Europe linked in the armed neutrality, on a late occasion decreed against its exercise. They opposed power to the established law of nature and nations. Every belligerent state is warranted in stopping the materials of war, in their passage to the enemy, and in searching for contraband and enemy's property, and the only existing controversy in the court of reason has

been, whether in any case compensation should be made for the goods detained, or their absolute seizure, receive the stamp of general approbation.

May I be permitted, without appearing tedious, to mention an instance perhaps more familiar to the scholastic mind, the conduct of the Romans at the Caudine Fauces, because though usually condemned by the hasty observer, it has been differently adjudged by many learned writers?

The general, say they, covenanted without orders, and without power. The state was not bound to ratify his promise. The Samnites never insisted that it was. No! they only urged, that the army should be put again in the situation in which they stood when surrounded. The Roman general had promised his utmost exertions to obtain ratification from the supreme power. The Samnites accepted the chance of his succeeding, and released the prey, to which their title could never be restored; all that the state was bound to do, was to give up the unsuccessful promisers to the foe, an offer made, and peremptorily rejected. Such is the language of writers on public law, and such the nature of all subaltern powers, according to them. See Grotius on the Samnite and Numantine Treaties, *de jure B. & P. Lib.* 2. ch. 15.

The observation is of the more consequence, because those positions bear strongly on a modern  
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question, which has been not a little agitated(3). I do not here give my opinion; the instance is adduced to caution the dogmatical but unlearned decider on similar questions, of the necessity of studying this law.

The limits of the rights of the besieged to destroy the suburbs of the town besieged, or of the besiegers to ruin its sumptuous edifices—the treatment of spies—the case of subjects taken in arms, and particularly among enemies who surrender on terms—the power of the victor over the property of the vanquished, occurring in every page of recorded time, demonstrate the necessity of this knowledge to the writer, the admirer, and the student of history.

I shall detain your attention by barely mentioning two instances more, of a nature perhaps too delicate to be at present discussed in this place. What floods of absurd argument have been poured forth on the questions, how far one state has a right to interfere in the government of another, or to change its own constitution? Infinite are the shades and gradations, the exceptions and qualifications, which attend such positions and enquiries; yet mankind seem to have forgot the adage, that error lies in generals, and to have supposed that no positions are true but those that

(3) That respecting the articles of Limerick.

are universal. The principles which ought to guide and determine us, in such disquisitions, have been clearly, and I think justly laid down by writers on the law of nations, an attentive and honest perusal of whose works might not only have silenced much of the wordy war on these subjects, but what is of infinitely more consequence, have saved much human blood.

To diminish therefore these difficulties which occur to unenlightened reason, to mitigate the horrors of war, and preserve the blessings of peace, their laws have been reduced by philosophers to a system, whose general method, order, and partition, it is now my business briefly to explain.

They first distinguish the internal law of conscience, which is usually called the *necessary* and *natural* law of nations, and which is always obligatory upon a nation with respect to its own duty, from the *positive* law of nations. This positive law consists not only of that which has arisen from custom and convention, and therefore is or may be confined to particular states, and depends upon their arbitrary volition; but also that external law, which dictates what every nation may require of every other, which law is independent of their mere volition, and yet being founded in the will as governed by reason, is usually called the voluntary law of nations. They divide therefore the law of nations into the natural, or in-

ternal law of conscience, and the positive; the positive again-into the voluntary or external law, and the arbitrary, which consists of the conventional and the customary.

Example will illustrate. War, founded on justice, is (according to the law of nature, which constitutes the necessary law of nations) a just method of acquisition. War, founded on injustice, is not. But by the voluntary law, every war publicly declared with all due forms, is *considered* as just on both sides, and accordingly amongst nations, conquest is always allowed as lawful title, unless the consequence of war unsolemn, as well as unjust(4).

The voluntary law, of which we have here spoken, must be carefully distinguished from the conventional and the customary; it is *universal*, and *founded in nature* as well as the necessary, and therefore is plainly distinguished from that law which arises from compact expressed or implied. It must also be distinguished from the necessary law, because it is the external, as that

- (4) This does not contradict my opinion, that the law of nature applied to nations, suffers no change; it is not here applied; but a positive law founded on implied compact (*that compact made by reason indeed, but no part of the immediate law of nature*) is substituted, and it is in this sense that Grotius says, *Jure gentium vetari multa solent, quæ jus naturæ permittit*, and the converse.

is the internal law of nations. The necessary is a sacred law, obligatory in conscience on all nations, in the regulation of their internal conduct. The other is a rule which their welfare and common safety obliges them to follow in mutual intercourse. The thing therefore forbidden by the natural may be tolerated by the voluntary, because its punishment may be inconsistent with general liberty and reciprocal independence; but we must not thence deduce its rectitude or justice. The general principles of national jurisprudence oblige us often to leave the offending nation to the chastisement of conscience, and the dispensations of Providence. That people is forbidden by the natural law of nations to do wrong, but punishment is wrested from our hands by the voluntary. The necessary law then immediately proceeds from nature, the voluntary mediately, nature recommending a deviation from her ordinary principles, on account of the relative state of nations, and their mutual advantage.

The following examples will illustrate the nature of these several laws :

That ships should be received with humanity when in distress, and assisted when shipwrecked, are dictates of the *necessary* law of nations.

The interdict to nations against interfering with the internal regulations of another's government or constitution, however unjust they may be, or

contrary to the natural and necessary law, is an instance of the *voluntary*.

All treaties are instances of the *conventional*; the right of sending ambassadors, the respect shewn to flags of truce, the abstaining from putting prisoners to death, of the *customary*(5).

The voluntary proceeds from the *presumed* consent of nations; the conventional from the *express*; the customary from the *tacit* consent; and the three together form the *positive* law of nations.

The voluntary is universal: the customary may or may not be so: the conventional scarcely can.

The customary and conventional may or may not be declaratory of the necessary and natural law of nations, or consonant to it; but if repugnant to it, are unjustifiable, for that is immutable.

Such are the distinctions which writers have thought necessary in treating of this law; the limits of a prælection will not suffer more minute detail. Still it may be asked (it is the last objection I shall consider in this exhortation to the study of a most useful and noble science) to what purpose these theories and these systems? In prac-

(5) This Mr. Ward calls the conventional; it is but a difference in terms. I follow Vattel.

tice behold them neglected, despised by statesmen, condemned by politicians. Let the objector recollect, that he makes practice the criterion of right, or denies its distinction from wrong: is there then no difference between right and wrong, between truth and falsehood, between justice and iniquity? Can the æthereal form of heavenly virtue be stained by the pollution of man, or its immutable essence change with the fickle villainy of the human heart? Forbid it Heaven! such opinions can never enter these walls; within this sanctuary refutation were idle. On the foundations of obligation we may differ, on its existence every heart will unite.

Let the disciples of Machiavel despise the law of nature. Let their doctrines boast a little temporary success or individual elevation. Providence does not descend to our minute span. Political villainy may prosper for a single life, or mould the fortunes of a particular man; but where is the nation which has prospered by despising the laws of Heaven. The life of nations is the period of philosophic observation. Their duration, and their felicity, the criterions to distinguish sound policy from tricking iniquity; to the tribunal of history I appeal, and time and fate shall be the judges. Who shall say for how many centuries false policy and mistaken cunning, in their day admired and called wisdom, have been generating the storm which now agitates

Europe, or how remote the fathers, whose sins are now visited upon their children(6).

But great is our error, if we suppose that the law of nations has no influence on the wicked ; it checks where it does not guide. No prince, no potentate, dare refuse an apparent allegiance to its sway. In the imagination of the poet alone has existed the bravo who announces, all this I do because I can. The manifestoes of belligerent powers are so many acknowledgments of its dominion. Nor are they merely obeisances to the star of virtue ; the disposition of nations tends to punish the violators of their common law ; that disposition will often controul the intrigues of courts, and the confederate artifice of mutually corrupting states. Nor are ministers always so wicked as to require impelling force from the public will. It were a cruel sentence on governors, which decreed them necessarily flagitious, or supposed the infusion of authority a poison to all the bland materials of the human heart. Many have been the salutary rulers, who were sons of rectitude, not servants of fear, and the doctrine that power and honesty are incompatible, checks every seed of confidence, and with eternal languor blasts the thus uncherished propensity to good, which the Deity placed in the rudiments of our constitution.

(6) This was written before the conclusion of the war.

Let us watch the progress of just and unjust wars. Some of us in the course of no long life have had opportunities. The enthusiasm, the spirit, the united force of the nation in the former is irresistible. The voice of faction is dumb ; the contest for power ceases ; murmur scarce whispers in her dark cave ; opposition is impotent. In the latter, with languid and desponding effort, the nation acts with but half its strength, while the other moiety in the violent ebb of popular opinion, revolves back on the issuing tide. Let us admire the truth, and acknowledge there is a law in our hearts, resistless, and incontrollable.

Is the knowledge of justice useless, because men will not always be perfectly just. Men, though not perfectly just, will be less unjust, knowing this law ; men will do wrong, but he would be a strange logician who inferred, there is therefore no use in knowing the difference between right and wrong. What is the use of all moral education ? Men are more virtuous by being taught what is right, nor is it possible that the human mind can be long exposed to the luminary of reason, without being whitened by its rays ; while then the unalterable bonds of right and wrong shall exist ; until the adamant walls which separate the infernal regions of fraud and iniquity from the blissful seats of light and Heaven, shall be pulled down ; so long as chaos and confusion dwell on the borders of Hell, and hellish deeds ; while national treachery shall de-

stroy reciprocal confidence, and the fangs of national injustice be the seeds of armed myriads against itself; while there be any virtue, while there be any praise, so long shall the law of nations tower in the rank of dignified science, and its disciples meet their reward.

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**LAW OF THE ADMIRALTY.**

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The author begs that he may not be accused of plagiarism, if on controverted questions he has adopted the very words of Lord Mansfield, and Sir William Scott, even at considerable length. Where can the reader tread so safely as in the footsteps of those most celebrated men, to vary from whose very modes of expression, when they can be had, would be miserable affectation of novelty, with total disregard of utility?

## CHAPTER I.

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### ON THE ANTIQUITY OF THE ADMIRALTY, AND OF ITS COURTS.

THE disquisitions on this subject, though rather curious than useful, have so much engaged the attention of great and able men, that to pass them over in silence might argue disrespect for their labours, or inattention to their fame. Godolphin and Exton(1) particularly have proved their learned research in tracing the derivation of the name, and by quotations proving the existence of this authority among the ancients, as also its early establishment in modern Europe, but especially in Britain, the queen of isles and sovereign of the sea.

Many languages have been searched for the derivation of the celebrated word admiral, or ammiral(2): some derive it from the greek

(1) Godolphin was judge of the admiralty about the middle of the seventeenth century; the Extons after him, of whom there were two, John and sir Thomas.

(2) By our old authors, the word is usually written ammiral; and in old additions of Milton I think it is so spelt:

“As when the mast of some tall ammiral.”

αλμυρος *salsus*, because his jurisdiction extends over the salt seas. Others from the saxon *aen mere eal*; that is, over all the sea: and others again, whose opinion Godolphin approves, partly from the greek, partly from the arabick; *amir*, or *emir*, in arabic, signifying *præfectus*; and αλιος, in the greek language, *marinus*, both which amount to *admiralius*, or rather *ammiralius*. Certain it is, that in the east, the appellation was also given to terrene princes and commanders: thus the sultan, or tyrant of Babylon, frequently mentioned in their transactions, was also and commonly called *admiral*(3).

We might suppose that it required no great learning to prove that a fleet must have a commander, and a navy a superintending or regulating power. Yet the early writers on admiralty jurisdiction, and propugners of its authority against the encroachments of the common law, have ransacked ancient and modern lore to shew that the admiral's authority has existed in almost every civilized nation, though under various names. The *thalassiarclus* of the Greeks, the *præfectus classis* of the Romans, and the *dungarius* of Constantinople, are vouched in aid of a position which required neither argument nor example, where the power was in any degree naval, or the country maritime; and the title of

(3) The mention of the admiral of Babylon is not unfrequent in the old romance, particularly in archbishop Turpin's famous chronicle.

admiral is bestowed by these writers as familiarly upon the Carthaginian Hanno, and Hamilco, as upon our own naval commanders.

It is a matter of more curiosity to trace the origin of this office in England and in France, because we thus also nearly fix the period when they began to be maritime powers, since the existence of the office must of necessity speedily follow the existence of a navy. Now it appears by the authority of John Tillius, a clerk of the parliament of Paris, who wrote *De Rebus Gallicis*, that the kingdom of France having been lessened by intestine divisions, and its kings reduced to narrow dominions by their potent vassals, such as the dukes of Normandy and Bretagne, and the earls of Flanders, Provence, and Languedoc, and having for a long time no command of the sea, it had consequently no occasion for admirals; and therefore, according to this author the first admiral of France was *Americus*, or *Amaurius*, viscount of Narbonne(4), so constituted in king John's reign, about the year 1200. And though some pretend that there was an admiral even in the days of king Pepin, yet those who pay any attention to probability, do not pretend that Amaurius had any predecessor except *Enguarantus Dom de Causy*, about twenty years before, in the reign of Philip the Bold; at least not as admiral of all France, for it is said that-

(4) See the book called *Laws of the Sea*, p. 54.

there were at one time two, at another time three admirals in France, dividing their jurisdiction according to the coasts of their several provinces respectively. This high office, lord ammeral, in point of dignity, was next to that of the high constable of France(5).

The writers on the antiquity of the English maritime power, and its sovereignty of the sea, insist, apparently with truth, and in consonance with the natural progress of events in the history of the two nations, that the office of admiral was of much earlier date; and Exton and Godolphin, not content with sir Henry Spelman's judgment (who was of opinion that this high officer was not known in England by that name or style until the beginning of the reign of Edward the first, *i. e.* about the year 1272(6), though the office was known long before) insist that both name and office were known at a much earlier period.

They say, that by an ordinance of king John made at Hastings, touching the sovereignty of the British sea in the point of striking sail, or veiling bonnets by the vessels of foreign nations to the king's ships, mention is made of the lord

(5) See Godolphin, p. 21.

(6) This bears a striking propinquity to the time when Causy was appointed admiral of France; and when we look into history and see that about this time the seas were extravagantly infested by pirates, which produced a war between England and France, we shall suspect a similarity of causes.

high admiral of England; and that by an ancient record in the Tower of London, entitled, *De superioritate maris Angliæ, & Jure Officii Admirallitatus in eodem*, it appears that the Admiralty of England, and the Jurisdiction thereof, was far more ancient than Edward the first; and from age to age successively, and time out of mind: and this they confirm by many other authorities.

Whatever may be the truth as to the name, the office was certainly known and used in England before the reign of Edward the first; and therefore when an eminent writer says(7) there was no such office till his reign, he must mean, not known by that name; for my lord Coke says(8), the admiral, and court of admiralty, were time out of mind; though he was at first called *capitaneus maris*, and by other names(9).

In the latter part of the reign of Edward I. and during the whole reign of Edward II. Edward III. and Richard II. there appear for the

(7) Mr. Reeves, Vol. III. p. 197. William de Leibern is styled, 15 Edward I. *admiraltus maris Angliæ*: it is extraordinary that Spelman should say in his glossary, that Richard Fitzallan, in the reign of Richard II. was the first admiral of all England.

(8) Coke, L. 260.

(9) Thomas de Moleton, 48 Henry III. was constituted *capitaneus maris*. See the Catalogue of Admirals in the Laws of the Sea, and consult Godolphin, Exton, and Zouch.

most part to have been two, and sometimes three admirals, styled of the north, west, and south. When the south coast, as sometimes was the case, was supposed to be comprehended in the west, there were only two. There is only one person, during the period aforesaid, who is styled admiral of England, which is Richard Fitzallan, earl of Arundel, which probably is the reason that Spelman says he was the first admiral of all England; but William de Liburne, 15 Edward I. is called admiral of the sea of England, and had no partner in authority, though the office was soon after divided. The authority depended on the commission, and was sometimes for life, sometimes during pleasure.

In the reign of Henry IV. we find several persons styled admirals of England; and in the reign of Henry VI. these great officers began to be styled admirals of England, Ireland, and Aquitaine.

This is the title most frequently annexed to succeeding admirals down to the reign of Charles II. though sometimes the names of Wales, Calais, &c. &c. are added. James, duke of York, is the first who is styled admiral of England, Scotland, and Ireland.

When the duke of York, afterwards James II. was excluded from office by the test act, in 1673, the king declared, that he was determined not to confer it upon any other person for the present, but to have the same executed by

commissioners(10), which was done accordingly; and to them was granted full power and authority to do, exercise, execute, and perform, all and every the powers, authorities, jurisdictions, acts, matters and things, which to the office of lord high admiral do appertain. There have since been two lord high admirals, the earl of Pembroke, in the reign of prince William; and king George of Denmark, in that of queen Anne; but from the accession of the house of Hanover, the office has always been in commissioners.

The king therefore alone now holds the office of lord high admiral, but in a capacity distinguishable from his royal character; he represents that great officer, though in more modern times we do not usually speak of the lord high admiral, but of the king in his office of admiralty(11). The distinct capacity in which he holds this power, will be more visible hereafter when we come to speak of prize and prize droits, there being a most material distinction between those things which come to him *jure coronæ*, and those which come to him in his office of admiralty, a captor having no claim under the king's usual proclamation to any share in the latter.

The prodigious perquisites which had been granted by patent to the lord high admiral, or

(10) See sir L. Jenkins' Letters, p. 705. 2d vol.

(11) See 1st Robinson's Reports, p. 81. and 229.

vested in him by immemorial usage, of course do not pass to the commissioners, and are reserved for his majesty's use by the express words of their commission. Notwithstanding the extensive words used in their commission, great doubts(12) arose with respect to their jurisdiction, to quiet which, in the second year of the reign of William and Mary, an act was passed by which it was declared that all jurisdictions and powers, which by act of parliament or otherwise are invested in the lord high admiral of England, have always appertained to commissioners of the admiralty, as if they were lord high admiral; in imitation of another act, 20 Car. 2. cap. 4. which provided for the powers of the lords commissioners of the treasury, when the place of lord high treasurer is vacant.

The court of admiralty is held before the lord high admiral, or his deputy, who is called judge of the court; when there was a lord high admiral, the judge of the admiralty held his place most commonly by patent from him(13), and was called his lieutenant, as the vice-admirals of the several districts were called deputies. The judge now holds his place by direct com-

(12) See these doubts exemplified on the question, Whether a commission of oyer and terminer could be directed to them, a statute of Henry VIII. saying, it must be to the lord high admiral. Sir L. Jenkins, 2d vol. p. 705.

(13) Sir L. Jenkins, vol. II. p. 706.

missions(14) from the crown, under the great seal; to him appeals lie from the vice-admiralty courts in the West Indies, and other plantations and settlements; and that on revenue causes as well as others, which had been doubted(15), and the privy council alleged to be the only proper court of appeal.

The court of admiralty is twofold; the *instance* court, which takes cognizance of contracts made, and injuries committed upon the high seas; and the *prize* court, which has jurisdiction over prizes taken in time of war. The commissions to hold these courts are perfectly distinct, though usually given to one person. Their respective jurisdictions and authorities will be hereafter discussed in appropriate chapters.

The instance court is governed by the civil law, the laws of Oleron, and the customs of the admiralty, modified by statute law.

The prize court is to hear and determine according to the course of the admiralty and the law of nations.

From the instance court an appeal lies to the king in chancery, who appoints delegates by

(14) When the duke of York ceased to be admiral, sir Leoline got his commission from the crown. He gives us these material words of it. "Te locum tenentem nostrum in dicta curia admiralitatis Angliæ & officialem principalem, commissariumque generalem & specialem, ac antedictæ supremæ curiæ admiralitatis Angliæ præsidem & judicem, ordinamus, facimus," &c. &c.

(15) See 2d Robinson's Reports, p. 248.

commission to hear and determine it. From the prize court, the appeal is to certain commissioners of appeal consisting chiefly of the privy council.

In *Scotland*, the jurisdiction of the admiral in maritime causes was of old concurrent with that of the session. The high admiral is declared the king's justice general upon the seas; on fresh water within flood and mark, and in all harbours and creeks. His civil jurisdiction extends to all maritime causes, and so is said to comprehend questions of charter-parties, freights, salvages, bottomries, &c. He exercises this supreme jurisdiction by a delegate, the judge of the high court of admiralty; and he may also name inferior deputies, whose jurisdiction is limited to particular districts, and whose sentences are subject to the review of the high court. In causes which are declared to fall under the admiral's cognizance, his jurisdiction is sole, insomuch that the session itself, though it may review his decrees by suspension or reduction, cannot carry a maritime question from him by advocacy. From the Lords of session the appeal now lies to the House of Lords.

The admiral of Scotland has acquired, by usage, jurisdiction in mercantile causes, even where they are not strictly maritime, cumulative with that of the judge-ordinary.

By the nineteenth article of the union with Scotland, all admiralty jurisdictions shall be under the lord admiral, or commissioners of admiralty in Great Britain.

But the court of admiralty now in Scotland shall be continued, and all reviews, reductions, or suspensions of sentences in maritime causes, till the parliament of Great Britain make regulations as expedient for the whole united kingdom, so as in Scotland be always a court of admiralty for determining all maritime causes relating to private right in Scotland.

And the heritable rights of admiralty and vice-admiralty in Scotland, shall be reserved to the proprietors as rights of property, subject in the manner of exercising to the regulations of parliament(16).

In Ireland it doth not appear that there ever was a lord high admiral distinct from that of England. Spelman and others mention, that when the office in England was tripartite, about 20 Edward I. a certain Irish knight, whose name is not mentioned, was admiral of the west, and the parts thereof, but not particularly or exclusively of Ireland. Ireland, as we have observed, was usually specified and included in the com-

(16) An interesting question is discussed in the Letters of Sir Lionel Jenkins, which arose between the two kingdoms of England and Scotland before the union, with respect to the power of the English court of admiralty to touch a sentence of the Scottish court evidently null, for want of calling all persons interested, where the ship condemned was afterwards found in England, and on the question whether the party injured was obliged to seek redress in Scotland by way of appeal. Sir L. J. 2d vol. 761.

mission to the lord high admiral of England.

There has been in Ireland, from time immemorial, an instance court of admiralty. It is mentioned, and the mention is worthy of note, more than once in the letters of sir Leoline Jenkins, and a new method of appeal from it at that time proposed, was probably by him prevented, and certainly justly condemned. This court was put upon a new footing in the year 1782, by an act which is given in the appendix. Of late years no prize commission has been given to the judge of the admiralty in Ireland, though he appears constantly to have possessed such an authority, while it was a vice-admiralty court, *i. e.* till the year 1782.

By the articles of union between England and Ireland, it is provided in the eighth article, that there shall remain in Ireland an instance court of admiralty for the determination of causes *civil and maritime only*; and that the appeal from sentences of the said court shall be to his majesty's delegates in his court of chancery, in that part of the united kingdom called Ireland.

Besides the instance and prize courts, there is a criminal jurisdiction in the lord high admiral over all crimes and offences committed on the sea, or on the coasts out of the body of any county, and of death or mayhem in great ships, being or hovering in the main stream of great rivers below the bridges of the same rivers. But

these offences are now by statute 28 Henry VIII. ch. 15. tried by commissioners of oyer and terminer, under the king's great seal; and this is at present the only method of trying marine felonies in the court of admiralty; the judge of the admiralty still presiding therein.

The courts of vice-admiralty will be spoken of hereafter in a separate chapter.

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## CHAPTER II.

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### ON THE ADMIRALTY LAW IN GENERAL.

It is my purpose in this chapter briefly to analyse the component parts of admiralty law, reserving its regulations until we treat of the particular subjects to which they apply.

The law by which the proceedings of the court of admiralty are governed, is composed of those parts of the civil law which treat of maritime affairs (as far as the decisions of the Roman code upon those subjects have with us been deemed equitable), blended with other maritime laws; the whole corrected, altered, and amended, by acts of parliament and common usage.

The maritime law of Rome was not the natural production of that military state; nor doth it, in the legal institutions of a nation so little addicted to commerce, occupy any considerable space. The *lex Aquilia*—the laws *de nautico fœnore*—the law *Rhodia de Jactu*—that *de nautis, cauponi*

bus, &c.—De exercitopia actione—De Incendio, naufragio, &c.—De naviculariis—De navibus non excusandis—De Naufragiis(1)—comprehend almost all which they have delivered to us on the subject. Peckins, as edited by Vinnius, is the best guide to our knowledge of their naval ideas.

The substance of these laws, as far as they can be interesting to us, may easily be given. They make the exercitor or owner answerable for the contracts of the master, and it is said they also make the ship liable for the same. They certainly do, inasmuch as the res or ship might be arrested by process till bail was given : but I do not find any such case among the tacita pignora of the Romans, though repairs of a ship might, like all other repairs, constitute a tacit pledge. They make the owner liable for the offences of the sailors, but not for their contracts. The owner was not liable for contracts of the master exceeding his authority : he was liable, therefore, for the wages of the sailors, or money laid out and lent for the repair of the ship ; but not if the master contracted to hire out the ship, when he was only authorised to convey the merchandize on board her. The creditor might sue

(1) These laws are found in the Pandects and Code respectively as follow :—Lib. 14. tit. 2.—Lib. 4. tit. 9.—Lib. 14. tit. 1.—Lib. 47. tit. 9. of the Pandects, and of the Code.—Lib. 11. tit. 1.—and same lib. 11. tit. 5.

either master or owner, and, if there were part-owners, each of them for his whole debt(2).

The laws on average and contribution do not materially differ from those of modern days, and have served as models for them.

The laws of marine interest declare that the risk of the lender on the credit of ship or cargo, shall commence from the sailing of the ship: that extraordinary interest for the risk, *si modo in aleæ speciem non cadat*, if not on a gambling contract, shall be allowed; and that even shipwreck shall not excuse the borrower, unless he expressly stipulates that the money shall not be paid until the ship reaches its destined port.

The Aquilian law, as construed and extended by equitable construction to all damage done to the property of another by irrational agents, is very general indeed. That part which relates to ships, or which is founded upon it, provides, that if a ship be run down by another through the fault of the crew, its whole value shall be paid; if by accident, nothing; and the fault, when it is such, sometimes falls on the sailors, sometimes on the owner.

The exercitor was answerable for all the merchandize and effects carried in his ship, even to a

(2) These regulations are contained in the law in the 14th book of the Pandects, on actions against owners, *De Exercitoria Actione*. Those on average and contribution in the celebrated Rhodian law *de Jactu*.

passenger carried gratis, and whether the damage happened by the fault of a sailor or a passenger; but not if it was occasioned by shipwreck or pirates, or any other of the causes which the civil law included under the name of major vis(3).

Plundering a vessel shipwrecked was by the Prætor's edicts punished by compelling payment of fourfold the value; by Antoninus, in freemen, by the bastinado and banishment for three years; in slaves, by scourging, and condemnation to the mines(4).

No ship was to be exempted from the public services of the state(5).

The emperor Constantine thus nobly expresses his rejection of any claim of imperial prerogative over shipwrecked effects: "*Si quando naufragio navis expulsa fuerit ad littus, vel si quando aliquam terram attigerit, ad dominos pertineat; fiscus meus sese non interponat. Quod enim jus habet fiscus in aliena calamitate ut de re tam luctuosa compendium sectetur*(6)."

"If a shipwrecked vessel be cast on shore, or reach any land, let the owners have her, and the exchequer put in no claim. What property has the treasury in calamity? Shall the revenue prove fit by misery?"

(3) See the law in the 4th book of the Pandects, *De Nautis, &c. ut Recepta Restituant*.

(4) Dig. 47. 9. *De Naufragio, &c.*

(5) 11th lib. Code, cap. 1.

(6) 11th lib. Code, cap. 5.

The holding out false lights, a custom there said to be frequent with fishermen to occasion shipwreck, is dreadfully punished.

Sterile, then, is the naval law of Rome. But the inhabitants of the little island of Rhodes, driven by their necessities to cultivate navigation, and empowered by their situation to do so with success, are esteemed the authors of the earliest sea-laws of which any traces now exist. From them the Romans are supposed to have borrowed all their marine regulations; a position, however, by no means generally admitted. It rests principally on the celebrated passage in the Pandects, in which Antoninus replies to the petition of the shipwrecked Eudemon(7). But there are not so many words in this answer as there have been controversies and opinions on its meaning: it employed the pen of Selden, and the great

(7) See the Pandects, lib. 14. tit. 8. and Bynkershoek de lege Rhodia. The words in the Pandects are:—"De-  
"precatio Eudæmonis Nicomediensis ad Antoninum Im-  
"peratorem. Domine Imperator Antonine, naufragium in  
"Italia facientes direpti sumus a publicanis Cycladas in-  
"sulas habitantibus. Respondit Antoninus Eudæmoni:  
"Ego quidem mundi dominus, lex autem maris, lege id  
"Rhodia quæ de rebus nauticis præscripta est, judicetur,  
"quatenus nulla nostrarum legum adversetur." The Greek  
original seems to me, however, to confirm the common  
opinion; nor do I understand why, in *ΟΔΕ νομος της θαλασσης*  
*τω νομω των ροδιων Κρινοσθω*, the words *τω νομω* are translated  
*lege id*, and not *lege illa*.

authority of Bynkershoek is exerted with much labour and ingenuity to shew, that probably the emperor's response applied only to the particular case, while he asks triumphantly, "How doth it happen that, in the great body of the civil law, we find only one solitary chapter, that de Jactu, taken from the Rhodian law?" It seems to be agreed, that the sterile and confused little heap (8) published by Leunclavius and others as a body of Rhodian laws, is a mere forgery of later times, unworthy of notice, and inapplicable to use. Yet Exton hath laboured to shew that the rhodian sea-laws were settled here long before the laws of Oleron.

The other ancient maritime laws, most particularly worthy of notice, are those of Oleron, of Wisbuy, and of the Hans Towns(9). The laws of Oleron were certain regulations of maritime affairs, established by our king Richard I. during his stay at the island of Oleron, on the coast of Guyenne in France, on his return from the Holy Land; though some ascribe much of the merit to his mother, Elinor duchess of Guyenne,

(8) "*Inconditam farraginem de rebus nauticis*," says Balduinus, "*de lege Rhodia*;" and Bynkershoek re-echoes his words.

(9) They have all been collected and published, together with a summary of the French marine ordinances, in a treatise, entitled, *The Laws of the Sea*, published early in the eighteenth century.

who had previously caused a marine system to be drawn up, called the Roll of Oleron. They were continued in the time of king John, and certain ordinances added to them, as appears by the Articles of Enquiry translated into Latin by Master Roughton: they were promulgated anew in the 50th of Henry III. and received their ultimate confirmation in the 12th of Edward III.

The fame and history of the Hans Towns are too well known to allow any surprize at their being the framers of a naval code; but that Wisbuy, a town in the now obscure island of Gothland, in the Baltic, should have once been the queen of commerce, is more surprizing; and it requires our recurrence to the history of the north, in centuries long since past, to account for the submission which Europe paid to her laws. These, with the ordinances of Antwerp, Stockholm, and other great ports of trade, as far as they have been received with us by usage, and are not contrary to the laws of our land, form as it were the common or fundamental law by which the admiralty proceeds and is governed: for it is an extraordinary truth, that the greatest naval power that ever existed, that of Britain, has no cemented naval code published by authority, such as France has collected together in one great ordinance; and to determine its will upon maritime subjects, we must consult its practice to know how far the maritime laws of ancient Europe have been here received, unless where acts of parliament

upon single and detached subjects have ascertained the law; and hence the great necessity of such treatises as the present.

We must not forget, among works of authority, the Guidon and the Consolato del Mare, two celebrated compilations. The latter, particularly, has been termed, by a most respectable writer, a venerable pile of maritime and commercial law, whose origin is of such remote antiquity, and rooted so deeply in the annals of time, that no one can tell with certainty at what period it was composed. It was certainly approved and adopted as their maritime law in the twelfth and thirteenth centuries by the free states of Italy, which, with some cities of Spain, then possessed almost exclusively the maritime commerce of the south of Europe, as the Hans Towns did of the north. It contains the constitutions of the Greek and German emperors; of the kings of France, Syria, and Cyprus; of Minorca and Majorca; of the Venetians and Genoese. It is abused by Bynkershoek and Hubner as a farrago, *ou un recueil assez mal choisi*; but it is in general, and justly, respected as a most valuable treasure(10), and Giannoni highly commends it.

(10) Those who have perused the Consolato, might almost imagine that the calumniators of the work had never read it with care. To my humble judgment, it appears a work of surprising merit, when we consider the period in which it was composed—clear, concise, and judicious. The copy which I have used, was lent to me by the favour of a

The Black Book of the admiralty shall conclude this enumeration: it is a book of great authority, and so acknowledged to be by Selden, Prynne, Exton, and all others who have written on maritime law; it contains the ancient rules, or, as they are called, statutes of the admiralty.

The records of the tower throw much light on the origin and jurisdiction of the admiralty. "The ancient statutes and usages of the admiralty," says sir Leoline Jenkins, "are some of them as old as king Richard I. and John; others as the famous inquisition at Queenborough, now four hundred years old."

Many of the statutes or acts of parliament affecting the admiralty instance court cannot strictly be said to make part of the admiralty law, inasmuch as they do not afford any rules or regulations for deciding causes therein; they go to limit its jurisdiction, to ascertain its boundaries, and correct its excesses or encroachments on the common law. They therefore will come under the chapter which treats of the extent of its jurisdiction, except those which relate to appeals, and the mode of criminal trials, and all which are properly referred to the head of practice. There are other statutes which literally make part of this admiralty law,

friend; for the book is now extremely rare, and is in the Italian language, printed at Venice, in 1737, with the *Spiegazione* of Casa Regis, and the *Portolano* of Da Mosto, annexed.—I have since procured a copy, but without the *Spiegazione*. The *Guidon* may be found in a book easily had, called *Costumes del Mer*.

such as those regulating the contracts between seamen and masters.

I have hitherto been speaking principally of the grounds and origin of that law by which the instance court is governed. The whole system of jurisprudence in the prize court, as lord Mansfield has observed, is peculiar to itself, and it hears and determines according to the course of the admiralty and the law of nations. In this court, therefore, we cannot have recourse to the laws of Oleron, or Wisbuy, or the Hans Towns ; for they do not contain any regulations respecting the general law of prize, scarcely mentioning the subject, except incidentally, amongst the accidents to which merchant vessels are liable ; and though in the Black Book of the admiralty there are some few articles concerning it, and also in the Ordinances of Barcelona, and two respectable chapters on prize law in the Consolato del Mare ; yet, for the most part, we must recur to the great and extensive code of the law of nations, to its best interpreter the civil law, and to the eminent writers who have commented thereon.

The names of Grotius, Selden, Bynkershoek, Casa Regis, Valin, Wolfe, and Vattel, are familiar to every advocate, and must employ his most serious studies ; while the numerous great and able decisions of the eminent judge who now presides in the English high court of admiralty, promise to raise as splendid and as consistent a system of jurisprudence, in a court the importance of whose

decisions has in our days interested all Europe, as was erected in the province of equity by lord Hardwicke, or by lord Mansfield in the sphere of the common law.

The statutes relative to prize are many, and shall be given under the head of prize law.

The acts of parliament, also, which relate to the cognizance and trial of offences in the court of admiralty, shall be given in the chapter which treats of the criminal court.

The jurisdiction of the criminal court, exclusively of statute law, is chiefly regulated by the laws of Oleron, and the ancient ordinances and usages of the admiralty.

My object in this chapter has been only to give a general sketch of the sources of the law by which this court is governed in its several branches. Its substance will be hereafter dilated and dwelt upon under the proper appropriate heads.

## CHAPTER III.

## ON THE PERQUISITES OF THE ADMIRALTY.

WHEN the office of lord high admiral existed in a subject with its full splendour and authority, the perquisites attending it were numerous and various, the revenue prodigious, and the powers, as a learned gentleman has observed, so great and extensive, that they were thought to tread upon royalty itself(1). These droits or perquisites, which flowed originally from the king by grant or usage, or by his majesty's assent in parliament, or from his royal proclamation, may be divided into civil and prize droits.

*CIVIL DROITS.*

The droits which I have termed civil, as distinguished from those arising in the course of war, principally relate to wreck of the sea; to flotsam, jetsam, and ligan(2); to derelicts and deodands,

(1) The king's advocate, in the case of the *Dickenson*.  
—Sir James Marriott's *Reports of Admiralty Decisions*, page 11.

(2) Sometimes spelt flotson, jetson, and lagon.

not granted to lords of manors or others; to the goods of pirates convict, and, according to Jenkins(3), of traitors, felons, self-murderers, and fugitives found within the admiralty jurisdiction. These and all droits are specially reserved to the king in the patent appointing lords commissioners of the admiralty; and though granted by patent to the lord high admirals, were, by the last holders of that great office, re-assigned to the crown, as they were by prince George of Denmark, his successor the earl of Pembroke(4), and, before them, by James duke of York, after a friendly controversy which they had occasioned between him and his royal brother. This notwithstanding, and though the king is now the only lord high admiral, the interest of the king, considered in that capacity in these droits, is so entirely distinguished from that of the crown, that they are still viewed in the light of droits of *admiralty*, and called by that name.

*Wreck.*—This word is thus defined by the common lawyers: Such goods as, after a shipwreck, are cast upon land by the sea, and left there within some county; for they are not wrecks, it is said, so long as they remain at sea, within the jurisdiction of the admiralty. 2 Ins. 167. 560.

The statute 15 Richard II. chap. 3. declares that the court of the admiral hath no manner of cog-

(3) Sir L. J. 1 vol. 89. 98.

(4) See sir J. Marriott, p. 11.

nizance of any contract, or of any other thing done within the body of any county either by land or by water(5); nor of any *wreck* of the sea; which declaration Mr. justice Blackstone approving, adds a reason, viz. for it must be cast on land before it becomes a wreck(6).

On the other hand, sir L. Jenkins, in his charge given at a session of admiralty(7) within the Cinque Ports, September, 2, 1668, says, you are to enquire whether any lords of manors, or others, do challenge to themselves *wrecks at sea*, or *other droits of admiralty*, in their manors, without sufficient title so to do; and these wrecks at sea he distinguishes from jetson, flotson, lagon, and derelict, and therefore his meaning annexed to the words must be different from lord Coke's, or else he must have differed in opinion from him as to the law.

So, in like manner, in the instructions given by the lords commissioners of the admiralty to the receiver-general of the rights and perquisites thereof(8), he is directed to enquire, make de-

(5) This, as I conceive, means the water of rivers; for on the sea coasts, the water between high and low water-mark, when the tide is in, is not in the body of the county, though the land in that space is when the tide is out. See Sir H. Constable's case.

(6) 3 Black. Com. p. 10.

(7) Vol. 1. 88.

(8) See Sir J. Marriott's Reports, p. 71.

mand, and take possession of all wrecks of the sea, flotsons, jetsons, lagons, derelicts, ships and goods of pirates, deodands, and all other droits, rights, duties, and perquisites, belonging to the lord high admiral.

And in a late case in the admiralty(9), the court says, "In cases of *wreck* and *derelict*, many instances of great hardship have happened, nay, of crying injustice, where salvors have been amused with negotiations till the goods were landed, and then the authority of the court has been defied, and the just demands of the claimants laughed to scorn, and the judge proceeds to express his doubts how far change of locality, so effected, would be permitted to defeat the claims of substantial justice." Here, wreck is distinguished from derelict, and wreck at sea from wreck brought to land.

Either, then, there is a direct contradiction here between the two jurisdictions, or we must reconcile them by distinguishing between wreck *of* the sea coming to land, and wreck *at* sea, which indeed the common lawyers do not give the name of wreck. The distinction which sir L. Jenkins takes is exploded, viz. that where any living creature is found on board, it is a droit of admiralty, and not wreccum maris—see his 2d vol. p. 164.—that circumstance is not now allowed to make any diversity in the definition of wreck. In the twenty-

(9) Of the Two Friends, 1 Robinson's Reports, p. 282.

third Article of Master Roughton both circumstances seem to be combined in the meaning of wreck, viz. the cause of it happening *at sea*, and no living creature escaping from thence to land.

But whatever ambiguity there may be in legal terms, in common parlance there doth not seem to be any, nor any doubt as to the law. A ship totally disabled by the force of a tempest at sea, though she doth not founder, and though one or two of her crew may have been by accident left behind, so that she is not a derelict, and being a whole ship and not a fragment, is not usually called flotsam, it is commonly called a wreck; and shipwreck at sea is as commonly spoken of as shipwreck on the shore: and if wreck at sea can be distinguished from flotsam and derelict, it is as clearly a droit of admiralty after a year and a day, as wreck on the shore is the king's jure coronæ, after the same lapse of time. And between high and low water-mark, floating wreck, while the tide is in, is in the admiralty: stranded wreck, when the tide is out, is in the king, or, by grant from him, in the lord of the manor; and, in both cases, *prescription* may invert the right.

The finders of wreck, &c. must now, by statute 26 George II. advertise it in the Gazette; and, in strictness of speech, it is not wreck until after the year and day elapsed. The laws respecting salvage are enumerated in the Appendix.

*Jetsam.* This is when a ship is in danger of being lost, and, in order to save her by lightening her, some goods are cast into the sea ; notwithstanding which she afterwards perishes. This is Lord Coke's definition(10) ; but Mr. Blackstone says(11), it is where goods are cast into the sea, and remain under water.

*Flotsam* is where the goods float upon the water (12).

*Lagon* is where heavy goods are cast into or sunk in the sea, before a ship is lost, but tied to a cock or buoy, in order, if Providence permits, to be found again.

Flotsam, jetsam, and lagon, are goods on or in the sea, and belong to the king, who hath granted them to the lord high admiral. They will pass by the grant of wreck, when cast upon the land ; but if they are not cast upon the land, the admiral hath jurisdiction, and not the common law(13).

If any owner appear to claim them within a year and day, he is entitled to recover the possession ; and if they, being *bona peritura*, have been sold, the profit must be accounted for to the true owner, he paying salvage ; the statutes as to wreck being by equity extended to these cases.—See Sir Henry Constable's case, 5 Rep.

(10) 2 Institute, 560. 106.

(11) Comm. 1 vol. p. 291.

(12) Bracton, lib. 3. ch. 2. Bl. Com. 1 vol. 291. See 12 Anne, ch. 18. as to wrecks.

(13) 5 Co. 107 and 126.

If flotsam be drawn on shore, and be there seized by one upon the land, an action lies against him at common law, and not in the admiralty; for the incident becomes severed from the jurisdiction of the admiralty; but if the same person take the thing at sea, and draw it on the land, and carry it away immediately, there the suit shall be in the admiralty, for it is one continued act(14).

*Derelicts* are boats or other vessels forsaken or found on the seas without any person in them; of these also the admiralty has at first but the custody, and the owner may recover them within a year and a day.

But that thing cannot be a derelict in the notion of the civil law which the owner quits through great fear, altogether against his will and intention. It is not enough that he leaves it *sine spe revertendi*, but he must leave it *sine animo revertendi*, at least the thing must be so long a time without a possession, that the true owner shall be presumed to have given over all thought of it. Sir L. J. 2 vol. p. 767. "Hence," says Sir Leoline, "some learned men are of opinion, that the laws in the Digests, upon the

(14) 1 Rol. Ab. 533. l. 10. If *jactus* be made by an enemy, the goods become the admiral's *immediately*, unless the pursuer take them up.—*Note*, An enemies ship, if a derelict, is a droit, and not prize. Case of the *Minerva*, 1786.

“title of derelicts, are now obsolete and useless, “so far are people now from leaving their property behind them voluntarily(15).”

It is manifest, that when we speak of derelict as a droit of admiralty, it cannot be in the sense of the civil law; for thus there never could be any derelict constituting a droit.

All these droits, considered as perquisites of the admiralty, or as producing to the king in that office a revenue, are of the less importance, because it seldom happens that an owner is not found within a year and day, and therefore in general the admiral has only the custody.

But if no owner be found, they become perquisites of the admiralty (the crown having, in such case, by the rule of all civilized nations, the exclusive property, and having with us granted it to the admiral) and the finder has no property in them. If no owner appears, or if the claimant cannot prove his property, the salvors have not acquired any right in the things found, but they must be satisfied for their expence and trouble out of the sale of the ship and cargo(16).

(15) Goods cast overboard to lighten the ship make no derelict, says Lord Coke. 5 Rep. 107. following the civil law.

(16) These are the words of Sir E. Simpson, an experienced practitioner, as quoted by the present learned judge, from manuscript notes communicated by Dr. Swabey.

To proportion the quantum of salvage is the principal occupation of the court upon this head, the residue to go to the crown, if no owner be found, otherwise to the owner.

It has been insisted, that there was one universal rule—giving to the finder, in all cases alike, without regard to the degrees of merit or service, one moiety of the thing preserved. But there is no such rule in the practice of any European nation(17), though it certainly is given as the rule in Roughton's Articles.

Cases of salvage, when they are fairly made out, and are not founded on false and frivolous pretensions, are received in the court of admiralty with the most liberal encouragement. The exact service is not the only proper test for the *quantum* of reward in these cases, the general interest and security of navigation is a point to which the court will likewise look in fixing the reward(18). Salvage is not to be confounded with mere acts of pilotage(19).

The persons entitled to salvage are not only the persons actually employed in the very business of saving the ship, as the boat's crew sent out by another ship, but also the persons who remained on board to navigate the latter; and who thus, by additional labour, enabled the boat's crew to

(17) 1 Robinson, 43 and 45.—(18) Ib. 313.

(19) Ib. 306.

be spared; and even a passenger who assists as a mariner, and likewise the owners(20).

*Pirate's goods.*—*Bona piratarum* passing by the usual grant, the admiral shall have the proper goods of a pirate after his conviction(21).

When goods taken by pirates are brought to England, the owner may take them(22).

The ships and goods of pirates are the lord admiral's, as also all goods piratically taken from the king's subjects or friends (the custody of them belonging to the lord admiral) in case they be not legally claimed within the year; and this, though the pirate should be subdued and brought in by the king's own ships; for besides that these goods are in the lord admiral's patent, there are precedents very full and apposite to this effect(23).

To a question raised, whether a king's man of war mastering a pirate who hath an enemy's ship in his possession, is to carry away the enemy for the king, quitting the pirate to the lord admiral? Sir L. Jenkins answers, that the pirate's occupancy, though it be for never so long a time, doth not alter or extinguish the property in his prize: which if it did, then might the pirate make a legal transfer of his possession to another;

(20) Owners are entitled for the ship's loss of time, changing its course, &c. &c.

(21) 3 Bul. 148.

(22) 1 Roll. 285.

(23) 2 Sir L. J. 765.

this a just enemy can, a pirate cannot do. The king therefore being gotten by this casual seizure into the possession of his enemy's goods, the common maxim takes place—*Melior est conditio possidentis*(24).

Though we have just quoted a learned judge, saying, that a pirate can make no legal transfer, yet it is said(25), that wherever a prohibition has been denied in admiralty suits, to recover pirate's goods which have been sold upon land, they have been, where those sales were collusive, and not if made on land, in market overt, and without fraud; and Sir Leoline himself says, that such is the law of Spain and Venice, though contrary to the general law of nations; but that it is not our law, I think, appears clearly from hence, that there can be no legal transfer of captured property, even in market overt, without a sentence of legal condemnation; and there can be no legal sentence, condemning as prize, goods taken by a pirate.

Whole nations having a fixt domain, public revenue, and form of government(26), such as the Algerines, are not treated as pirates.

In this, as in all other civil maritime cases, if new matter and cause of action arise upon the

(24) 2 Sir L. J. 766.

(25) 1 Roll. Ab. 530. Hob. 79. 2 Brownlow, 29. 2 Levynz. 25.

(26) 2d Sir L. Jenkins, 791.

land, this court loses its jurisdiction, the new act being severed from the original, but not so if it be one continued act: Thus(27), where a ship and tackle were seized as pirate's goods in the Thames, and the owners seized and carried away the sails and tackling, prohibition went, because this matter arose subsequently, *infra corpus comitatus*; not so if they had remained on board, and been in the custody of the admiralty on shore.

We have left but one droit yet unnoticed; to wit, deodands, which are things instrumental to the death of a man on ship-board, or goods found on a dead body cast on shore. These Jenkins enumerates among droits of admiralty; but Lord Coke says, there can be no deodand *in aqua salsa*. 3 Ins. 58. but only in rivers or *aqua dulci*.

#### PRIZE DROITS.

The droits which accrue in time of war to the lord high admiral, far exceed in splendour and extent those of which we have hitherto spoken. They have been described to be all the goods of the king's enemies taken without commission(28), or found, or by accident brought within the admiralty commission. But this description is not sufficiently perfect, nor sufficiently accurate. In

(27) 1 Roll. Ab. 530. 3 Bald. 147. 1 Showen, 179.

(28) By Comyns, in his Digest Admiralty, D. following Sir L. Jenkins.

the reign of Charles II. when the Duke of York was lord high admiral, many amicable contests arose between him and his brother, as to various goods and matters taken in the Dutch war; whether they belonged to the king *jure coronæ*, or to the duke, under his patent as perquisites of the admiralty? The correspondence of the duke with the judge of the admiralty on these subjects is curious and interesting(29). At length these disputes were settled and terminated by the following orders of the privy council, which have been looked up to as a standard or wall of partition ever since.

*Orders in a Council held at Worcester House, the  
6th of March, 1665-6.*

Whereas, through the long intermission of any war at sea by his majesty's authority, several doubts have arisen concerning certain rights of the lord high admiral in time of hostility, the determination whereof appearing very necessary for the direction, as well of his majesty's officers as of those of the lord high admiral; upon full hearing and debate of the particulars hereafter-mentioned, the king's counsel, learned in the common law, and likewise the judge of the high court of admiralty, and those of his majesty's, and his royal highness the lord high admiral's

(29) Sir I. Jenkins, 2 vol.

counsel in the said high court of admiralty, being present, his majesty present in council was pleased to declare :

That all ships and goods belonging to enemies, coming into any port, creek, or road, of his Majesty's kingdom of England or of Ireland, by stress of weather, or other accident, or by mistake of port, or by ignorance, not knowing of the war, do belong to the lord high admiral; but such as shall voluntarily come in, either men of war or merchantmen, upon revolt from the enemy, and such as shall be driven in and forced into port by the king's men of war; and also such ships as shall be seized in any of the ports, creeks, or roads, of this kingdom, or of Ireland, before any declaration of war or reprisals by his majesty, do belong unto his majesty.

That all enemies ships and goods casually met at sea and seized by any vessel not commissioned, do belong to the lord high admiral.

That salvage belongs to the lord high admiral for all ships rescued.

That all ships forsaken by the company belonging to them, are the lord high admiral's, unless a ship commissioned have given the occasion to such dereliction, and the ship so left be seized by such ship pursuing, or by some other ship commissioned, then in the same company, and in pursuit of the enemy(30); and the like is to be un-

(30) Where a non-commissioned ship is joint captor with a commissioned, the share which the former would have

derstood of any goods thrown out of any ship pursued.

The eminent judge who now presides in the court of admiralty, has observed, that as long as the office of lord high admiral (though now residing in the person of his majesty) continues in this kingdom to have a legal existence, it is extremely proper that the droits and perquisites of the office should continue as anciently distinguished; and although the difference may not be very important as to any immediate consequence under the present application of them, (which is directed by the treasury, and not by the admiralty) it is still fit that they should be strictly, and with as much exact observance of the ancient rules, accounted for, as if the proceeds were carried in the ancient and distinct course. "Amongst these rules," says he, "I take it to be an established maxim, that the rights of the lord high admiral are to be considered as rights stricti juris, as rights originally granted, in derogation of those higher rights of the crown, which are vested in the crown for general utility: such grants are to be construed strictly on the known presumption, that the crown has not parted with any right which the public wisdom has conferred upon it, farther than the express words of the grant import."

had if commissioned is a droit of admiralty. If a non-commissioned ship brings an enemy's vessel into port, and though a commissioned ship seize her there, she is still a droit.

It is observed by the same high authority, that these rights of the lord high admiral are entitled to great attention and respect, but an extension of them beyond their absolute limits, is not to be favoured by construction; they are parts and parcels of the ancient rights of the crown, communicated by former grants to that great officer, under a very different state and administration of his office, from that which now exist in practice.

It is then a general observation, applicable to these droits, that they, like all other grants of the crown, are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives, and rights, and emoluments of the crown, being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments, are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away.

Having premised these general remarks, taken from the highest authority, we proceed to comment upon the several parts of the orders of council above-mentioned, which are the grand guide in evidencing these droits granted to the lord high admiral. They give him the benefit of all captures by whomsoever made, whether commissioned or non-commissioned persons, under certain circumstances of situation and locality—that is, “of all enemies ships and goods coming into

“ports, creeks, or roads of England, or Ireland; “unless they come in voluntarily upon revolt, or “are driven in by the king’s cruisers(31).”

The first word here claiming our attention, is the word *coming*, which by usage has been construed to conclude ships and goods already *come* into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging; but not into ports belonging to foreign powers. But on the words ports, creeks, or roads, considerable controversies have arisen, and it is now settled, that these words have a signification intimating certain known receptacles of ships, more or less protected by points and head-lands, and marked out by limits, and resorted to as places of safety. Every anchorage-ground is not a roadstead—a roadstead is a known general station for ships, *statio tutissima nautis*, notoriously used as such, and distinguished by the name, and not every spot where an anchor will find bottom and fix itself. Were it otherwise, the admiral would be entitled, even if a ship at anchor in the channel of Dover was seized by a commissioned cruiser.

The next words in the order of council to be observed upon, are, *by stress of weather, or other accident, or by mistake of port, or by ignorance, not knowing of the war*; all vessels under the above circumstances, though taken by commissioned

(31) These words are taken from 1 Robinson’s Reports, p. 232.

cruisers, become droits of admiralty, much more if taken under the guns of a fort, and by a firing from the shore; the garrison of the fort in such case must be content to take a reward from the bounty of the admiralty, and not a prize interest under the king's proclamation. And even cases may occur in which naval persons, having a real authority to take upon the sea for their own advantage, might yet entitle the admiralty, and not themselves, by a capture made upon the sea by the use of a force stationed upon the land. Suppose the crew, or part of the crew of a man of war were landed, and descried a ship of the enemy at sea, and that they took possession of any battery or fort upon the shore, such as may be met with in many parts of the coast, and by means of such battery or fort, compelled such a ship to strike; it is not to be doubted that such a capture, though made by persons having naval commissions, yet being made by means of a force upon the land, which they employed accidentally, and without any right, under their commission, would be a droit of admiralty, and nothing more.

Such ships as revolt from the enemy, and voluntarily come into our ports are expressly excepted from being droits of admiralty, as may have been observed with respect to certain ships of the Dutch fleet during the present war; and we see also, that such ships as have been forced into port by the king's men of war, or are deserted at sea in consequence of pursuit by a com-

missioned ship, and then seized by such ship pursuing, or by some other ship commissioned then in the same company, and in pursuit of the enemy, do belong to his majesty.

Ships seized in any of the ports, creeks, or roads of the united kingdom of Great Britain and Ireland, *before* any declaration of war or reprisals by his majesty, do belong unto his majesty; and therefore the seizure of the Spanish ships, which happened to be in the ports of Ireland, on the breaking out of the present hostilities with Spain, as droits of Admiralty, was erroneous.

Though all vessels detained in port, and found there at the breaking out of hostilities, are condemned *jure coronæ* to the king; yet if in our ports, an order of council puts a general embargo on the ships of any foreign state, and reprisals afterwards take place, such vessels would not be condemnable as prize to the king *jure coronæ*; nor would such an embargo extend to foreign ports; but this is only true of mere civil embargoes, where the hand of the custom-house only is laid upon a ship in the civil mode of forbidding an egress, and not of restraints and compulsions acting by terror and force; for any mode of forcible occupancy or detainer prior to hostilities, is sufficient to render the things seized droits of the admiralty.

Rebels goods have always been condemned as droits of admiralty, when taken by non-commissioned persons.

It is notorious, that after war commenced, all commerce with the enemy, even without any express edict to that purpose, is unlawful; and therefore merchandize put on board a cartel ship in our ports by British manufacturers, have been condemned as droits of admiralty.

The admiral was formerly entitled to the tenth of all prizes, and of this claim Sir L. Jenkins gives the following account: "There is no mention," says he, "in the lord admiral's patent of these tenths, nor is there any constant interrupted custom alleged for them, excepting in the case of private men of war, from whom the lord admiral doth receive his tenths. That the Earl of Warwick had them given him by the late usurpers, from the public ships likewise, is yet fresh in memory; and that after they had extinguished the name and office of admiral (as much as in them lay) they sequestered the tenths, as a distinct thing in the provenue of their prizes, and applied them to different uses from the rest.

"As for the ancients presidents, the exchequer is more likely to afford them, if there be any, than the court of admiralty; only it appears by the black book in the admiralty (which certainly is ancients than King Edward the Third's time) that the admirals (for then there were three or four together) had their dues and perquisites established unto them in time of war. An admiral had, while on the

“king’s service by sea or land, four shillings a  
“day; if a knight, six shillings and eight-pence;  
“if a baronet, thirteen shillings and four-pence;  
“if an earl, more, an hundred marks a quarter;  
“pour regard de trente hommes d’armes, those  
“are the words, two shillings a day for every  
“chevalier; one shilling to every ecuyer; six-  
“pence to every archer on board him. Besides,  
“he had shares (and the word shares is still in  
“his patent) in all prizes, whether taken by  
“ships in the king’s pay, or by private adventu-  
“rers; other perquisites he had not worth the  
“mentioning, because proportioned to the rate  
“of money, and to the tenuity of those times.  
“The lord admiral hath, it seems, none of  
“those petty perquisites at this day; yet it can-  
“not, I think, be denied, but that he has a  
“right unto them, or to something else in lieu of  
“them, both virtute officii, and by the words  
“of his patent, which gives him all the rights  
“and emoluments of his place, in as full and  
“ample manner as any of his predecessors en-  
“joyed them. But how the appointment in the  
“black book came to be disused, does not ap-  
“pear by any memorial that I can find in the  
“admiralty: if it were changed into tenths, it  
“were possibly in conformity to the French  
“model, where the admiral, for his support, and  
“in consideration of the dignity of his place,  
“and the importance of his service, had, in the  
“year 1584, son droit de dizieme; it was then

“a right established, not a new acquisition, and  
“by edict confirmed unto him, not only of all  
“prizes whatsoever, but of all prisoners too, and  
“that suivant les anciennes ordonances, as by the  
“edict at large doth appear(32); and the benefit  
“of this precedent,” saith Sir Leoline, “as I con-  
“ceive, was enjoyed by the Prince of Orange in  
“the same kind.”

In more ancient times the lord admiral had a greater share, according to the black book of the admiralty; in case of all prizes whatsoever, the king had but one-fourth; the lord admiral had two-fourths, and the rest was divided; but this was before there was properly any royal navy, and when fleets fitted out were the ships of the subject; but when the royal navy was formed, the admiral got a tenth part of all prize goods, but this right has been entirely done away by the 13th Geo. II. cap. 4. sec. 2.

We have seen that no droits, no profits, or emoluments, are vested in the lords of the admiralty, but all reserved to the crown by their commission; but the power of collecting these perquisites is in them, and accordingly they appoint their own collectors by their own commission.

The board of admiralty is merely executive, as trustees for his majesty, and as a board of revenue in the case of droits. The power of collecting and receiving only remains with the officers of the admiralty, accountable to the lords commissioners of

(32) Edict Henry III. 17th April, 1584.

the admiralty, who, or any three of them, give discharges and quietuses to the collector. So far the grant goes: but by course of office the lords are accountable to the exchequer, and grants of the droits are made by the king's warrants in the treasury, upon petition.

There have been instances in which attempts have been made, under the words of particular acts of parliament, to distinguish between droits and forfeitures, and to insist that the value of ship and cargo should be paid directly into the exchequer(33), without passing through the hands of the high court of admiralty.

The distinct capacities of the king, claiming *jure coronæ*, and in his office of admiralty, occasion a necessary distinction of officers, employed to enforce his rights.—A king's advocate and king's proctor or procurator general.—An advocate of the admiralty and proctor for the king in his office of admiralty. A receiver-general of the rights and perquisites of the admiralty, and some correspondent officer in his majesty's office of treasury, or an escheator, nominee, &c. &c.

The perquisites of royal fishes, and of fines and amerciements in the court of admiralty, are not worthy of being dwelt upon.

It is very observable, that at one period the king was, in the most literal sense, the lord high

(33) See the remarkable case of the *Dickenson*, in Sir James Marriot's decisions of the high court of admiralty.

admiral (in the reign of Charles II.) there being for a short time no lords commissioners of the admiralty.

We have already quoted from the highest authority the *dictum*, that the resolutions of 1665 give to the admiral the benefit of all captures, whether made by commissioned or non-commissioned persons, of enemies ships or goods coming into ports, &c. unless they come in by revolt, or are driven in by the king's cruizers. And yet it is worthy of notice, that Sir Leoline Jenkins maintains, that though seizures in port, after a declaration of war by persons non-commissioned, make droits of admiralty, the king's prerogative of seizing enemies goods *jure belli*, or *jure reprisalium*, is still concurrent with that of the lord admiral, within his jurisdiction, and commissioned ships in the king's service may also seize in port(34). "For," says this learned judge so often quoted, "the right in port doth not appear to be in the lord admiral to the prejudice of the king's own ships, either by patent or by prescription. Not by patent, for the words *bona inimicorum casu fortuito reperta*, do refer as well to the open seas (and there the lord admiral claims not against the king's ships) as to the ports." Nor by prescription, as the learned judge proves by

(34) That is, as I understand his opinion to be, if the subject matter has not been previously seized by a non-commissioned person, and so become vested in the lord high admiral as a droit.—See Sir L. Jenkins, 2d vol. p. 765.

appeal to the precedents by him found; "and if it  
"were otherwise," saith he, "the king's ships would  
"be in a condition more bounded and restrained  
"than the *private* men of war, who are commis-  
"sioned to seize in port, as well as upon the open  
"sea. And when the king grants this power (which,  
"even where there was a distinct lord high admiral,  
"was granted not *virtute officii*, but by special  
"commission) he cannot be intended to exclude  
"his own ships from that liberty."

It seems difficult to reconcile this opinion with that first mentioned, unless they refer to ships under totally different circumstances, and that Jenkins speaks only of cases omitted in the resolutions of 1665. Let us put this case: a neutral ship, after war commences, comes into one of our ports, having an enemy's cargo on board, and this not through stress of weather, nor by accident, nor ignorance of the war. It seems to be a *casus omissus* in the resolutions of 1661.

Undoubtedly the orders of council in 1665 leave still latitude for controversy, and many cases unsettled. If a neutral vessel brings in an enemy's cargo, as suppose of French wines, during a French war, to sell in these countries; or if an enemy's ship of war coming with the purpose of hostile invasion into one of our ports, as the French have done into Bantry Bay, were there captured by an English man of war; these will be found to be cases not described in the second or any article of those orders. And it is observable, that the framers of

the prize acts, as if they had not these orders in contemplation, or had forgotten them, do in general words say, that persons taking ships or vessels in any creek, haven, or road, shall have the sole interest therein after adjudication.

Still further to confirm this assertion, that there is still room left for doubts by these orders, it must be noticed, that so lately as in the year 1782, a question was started in the case of the *Le Hazard* and other ships, in the resolution of which eminent civilians differed in opinion, whether a distinction was to be established between ships taken *before hostilities* declared, and ships taken afterwards, upon any expression in the said orders of council of 1666, so as to entitle the admiralty in the one case, and exclude it in the other? And the better opinion appeared to be, that the expression *enemies* ships in the second clause includes all ships *adjudged* to be enemies ships, whatever be the ground on which they were adjudged, and whether that ground was precedent or subsequent to the act of capture, because it is the adjudication, and not the capture, which declares the quality and character of the ship(35).

(35) Thus in the case of the *Saint Croix*, a French ship, taken in 1775, before any declaration of hostilities against France, and therefore reclaimed, the order for hostilities issuing before adjudication, she was considered as a *droit* of admiralty. Yet in the cases of the *Santa Catalina* and *St. Catherina*, contrary opinions were held in the year 1782.

## CHAPTER IV.

## ON THE JURISDICTION OF THE INSTANCE COURT.

THE limits and extent of the jurisdiction of the instance court have been the subject of such warm controversies in the courts of common law on questions of prohibition, and however they may be now well understood in the supreme courts in England, still afford so much room for dispute and doubt before the tribunals of other countries appendant to the British crown, that it is surely worth our pains to try, both upon principle and by authorities, to fix these hitherto confused boundaries. Yet, in endeavouring to do so, my researches, from want of reports of cases in the admiralty instance court, must chiefly be confined to the doctrines and decisions of the law courts; although possibly, in some of the cases, the admiralty would still decree for its own jurisdiction(1), if not

(1) Thus it should seem, notwithstanding the resolutions or determinations of the law judges, that, in the case of *Ladbroke v. Cricket*, 2 Term Reports, 649, the court had exercised its old power of trying an hypothecation or bottomry bond and its validity, though made on land, in England, between English subjects, and under seal, where the defendant had not objected to the jurisdiction.

prohibited, and no plea put in to their jurisdiction, or appearance under protest.

I shall consider its jurisdiction—First, with respect to contracts, then with respect to torts.

#### CONTRACTS.

The contracts over which it has jurisdiction, or of which it has cognizance, are marine contracts, *i. e.* contracts made on the sea, whose consideration is maritime, and not ratified by deed nor under seal. This description appears to my humble judgment, according to the received authorities, the most accurate that can be given, though to the parts of it there are exceptions as to every general rule, and though, as I hope to prove, reason would dictate very different limits. And first—

*Contracts cognizable in the Admiralty must be made upon the Sea.*

This rule is universally known, and mentioned by every writer who has treated of the admiralty law; yet the controversies and disputes with respect to its construction have filled numerous volumes, the courts of law interpreting it with the utmost strictness, while that of admiralty strove to give it extraordinary latitude, and each of these jurisdictions, in former times, adhering to certain technical assertions, without adopting fixed rational principles.

Thus the admiralty, adhering to the letter of the rule, wished to draw within its province the trial of all agreements made upon the sea, though not relative to maritime affairs; until, in Bridgeman's case, it was decided that the validity of a contract made at sea, not for or by reason of any marine affair or matter, was triable only by the common-law<sup>(2)</sup>. And here, if the judges of those courts had stopped, they would have rested on a rational principle; but they proceeded to assert, that even merely marine contracts, though made upon the sea, if to be executed upon the land, were triable only in their courts; and that, even though they were not to be executed on the land, they might be made triable at the common law, by supposing them to have been done at Cheapside and such like places; and, what is surprising, Sir William Blackstone, in our own times, seems to recognize and to justify both these positions.

The fictions we have alluded to are seldom or never to be found in more modern reports, though of old they were thought worthy of the pens of Godolphin and Sir Thomas Ridley in attacking them, and of Lord Coke in their defence; and

(2) The words of Lord Hobart, in Bridgeman's case, relate only to obligations, *i. e.* in the common legal sense of the word, bonds or other specialties; but his reasoning extends to any agreement whatsoever. It seems to have been the case of a captain of a ship empawning the ship at sea for his own private debt.

Blackstone, when he says that it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster hall, quotes no authority later than the 4th Institute, 134.

As to the other position, that a contract made upon the sea is not cognizable in the admiralty, because it is covenanted to be afterwards executed upon the land, it surely is not true; and wherever its jurisdiction is excluded as to agreements upon the sea, that is not the reason. This is admitted by Lord Hobart in the very case of *Bridgeman*. He granted the prohibition prayed, because the subject matter of the suit in the admiralty did not appear to be a marine contract; but he admitted, that if the captain upon the sea, his ship being in distress, empawned or hypothecated the ship for necessities, though his undertaking was afterwards to be fulfilled, or the money to be paid, upon land, that the admiralty had jurisdiction.

The courts of law, not content with these endeavours which seem of late to have been forgotten, made other attempts, in which, to the detriment of the public, they have been more successful. Adhering on their part to the strict letter of the rule, that the business of the admiralty was only with contracts made upon the sea, they here took locality as the only boundary, though, in the instances before mentioned of con-

tracts made on sea, they refused this limit; and having insisted, as indeed Judge Blackstone has even of late done(3), that contracts upon land, though to be executed on the sea; and contracts at sea, if to be executed on the land, were not cognizable by the admiralty, they left to it the idle power of trying contracts made upon the sea to be also executed upon the sea, of which one instance might not happen in ten years, and than which, indeed, nothing can be conceived more rare.

It had been the practice of the admiralty, in the beginning of the last century, to exercise jurisdiction as to contracts made upon land but relative solely to shipping and naval affairs, particularly with respect to material men, *i. e.* such as furnish tackle, furniture, or provisions, for the repairing of ships, or setting them out to sea; as

(3) Mr. Justice Blackstone's words are:—"If part of any contract, or other cause of action, doth arise upon the sea, and part upon the land, the common law takes place of the particular. Therefore, though pure maritime acquisitions, earned and becoming due on the sea as seamen's wages, are one proper object of admiralty jurisdiction, though the contract be made on land; yet, in general, if a contract be made in England to be executed on the seas, as a charter-party that a ship shall sail to Jamaica, or be in such a latitude by such a day; or a contract made on sea to be performed in England, as a bond made on shipboard to pay money in London; these mixed contracts belong not to the admiralty jurisdiction."

well as to freight, charter-parties, and other marine contracts, though made upon land. Infinite were the advantages attending this practice. If a foreign merchant owed money to an Englishman, any ship of his coming into the river was liable to arrest, the creditor not being obliged to look for his debtor in a foreign country, and possessed of a security here; and by this means the foreigner also was better enabled to gain credit here upon occasion. On the other hand, if an English merchant owed money upon a foreign contract, the plaintiff might have, if the instrument was denied, a commission into his own country *pro scrutinio*, which he could not have at common law(4). And as all merchants abroad make their contracts according to the marine or civil law, it was a great satisfaction to them to have their suits determined in a court governed by that law. If the master or owner of a ship also sued for freight, the merchant could in that court, if he received damage, make stoppages to the amount of the damage; and the persons who furnished tackle, furniture, or provision for ships, or were employed in repairing them, instead of having remedy at law only against the master (who, though he bespoke the materials, is commonly not worth the twentieth part of the value) having their remedy

(4) Mr. Justice Blackstone is forced to confess the want of this power, 3 vol. Comm. p. 75. when speaking of policies of insurance.

against the ship, were ready to give by twenty-fold more of credit to the owner. Add to all this, that charter-parties, which are only calculated for sea affairs, were interpreted and adjudged by the sea laws; and all causes were determined with the utmost expedition, according to the style of the court, not from term to term, but from day to day, and tide to tide, all the year round.

These arguments were dilated and put with irresistible force by Sir Leoline Jenkins(5), in the reign of Charles II. After numerous prohibitions had on suits to the admiralty upon the subject above-mentioned, he is supported by the agreement entered into in the year 1575 between

(5) Sir Leoline Jenkins having been much in confidence with the Stuart family, was decried, or at least slightly spoken of, by Burnet and others after the revolution: he was, however, a considerable man; and many of his schemes and designs, if they had been carried into execution, would, in my humble opinion, have been very salutary to the state, particularly that for establishing a standing and permanent court of delegates. His authority in matters of the admiralty is deservedly high, and every student should peruse his celebrated argument before the house of lords, in the reign of Charles II. on a bill to ascertain the jurisdiction of the admiralty. In this he ably points out the inconveniences to the public, and to the trade, if that jurisdiction be evaded, 1st. As to foreign contracts, or those made abroad. 2d. As to mariners wages, freight, and charter-party. 3d. As to building and victualling of ships, and as to material men, *i. e.*, who furnish materials or supply work for the ship. 4th. As to disputes between part-owners.

the judges of the king's-bench and the court of admiralty, and also the resolutions entered into by all the privy-council of England, and subscribed by all the judges in the year 1632(6), which, as Sir Leoline observes, were the result of many solemn debates, and not the effect of artifice or surprize, in proof of which the usurpers, after the death of King Charles I. though they abolished the office of lord high admiral, made ordinances similar to the above resolutions of the council; and that, at the restoration, the merchants petitioned for a re-establishment of rules according to those of 1632.

These resolutions are as follow :

“If suit should be commenced in the court of admiralty upon contracts made, or other things personal, done beyond the seas, or upon the sea, no prohibition to be awarded.

“If suit be before the admiral for freight, or mariners wages, or for breach of charter-parties, for voyages to be made beyond the seas; though the charter-party happen to be made within the realm, so as the penalty be not demanded, a prohibition is not to be granted: but if the suit be for the penalty; or if the question be, whether the charter-party were made or not, or whether

(6) To these resolutions the objection cannot be made, which is urged by my Lord Coke, 4th Institute, p. 136, to the agreement of 1575, viz. that though it was read over in his majesty's presence, and the hearing of the judges, yet they never assented thereto.

the plaintiff did release or otherwise discharge the same within the realm; this is to be tried in the king's courts at Westminster, and not in his court of admiralty.

“If suit be in the court of admiralty for building, amending, saving, or necessary victualling of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm.

“Although of some of those causes arising upon the Thames beneath the first bridge, and divers other rivers beneath the first bridge, the king's courts have cognizance; yet the admiralty has jurisdiction there, in the points specially mentioned in the statute of 15 Richard II. And also, by exposition of equity thereof, he may enquire and redress all annoyances and obstructions in these rivers, that are any impediment to navigation or passage to or from the sea; and also may try personal contracts, or injuries done there, which concern navigation upon sea. And no prohibition is to be granted in such cases.

“If any be imprisoned, and upon habeas corpus brought—if it be certified that if any of these be the cause of his imprisonment, the party shall be remanded(7).”

(7) These resolutions are inserted in the early editions of Croke's Reports, but left out in the later, seemingly *ex industria*. They are set forth by Zouch on the Admiralty Jurisdiction.

Notwithstanding all these authorities and arguments, it seems now settled that the ship cannot be hypothecated at home before the voyage commences(8), and that no person can sue in the admiralty for work and labour done in port before the voyage begins, or necessities sold for the ship's use before she sails(9); and which is more severe, and indeed almost bordering on absurdity, it has been determined(10), that where necessities

Some of the advantages of the admiralty jurisdiction are also well summed up in *Le Caux v. Eden*, Douglas, 600, where it is observed, that if foreigners were obliged to sue at common law in such cases, they could very rarely remain in England with their witnesses the necessary time; whereas by the rules of the admiralty, a cause can hardly last a month: but the great convenience is, that all parties concerned may join in one libel; whereas, at law, the costs alone of the numberless suits to which captors—and, I add, creditors—on account of the ship, would be exposed, independent of damages, would deter any man from suing.

(8) *Lister v. Baxter*, Strange 695. See, however, Lord Mansfield's words, Cowper, 639. and 1 Term Rep. 109.—It is said, that every contract with the master of a ship implies an hypothecation by the maritime law; but it is otherwise by the laws of England—2 Lord Raymond, 806.—While at home, it is simply a mortgage of the ship, as of any chattel.

(9) See *Ross v. Walker*, 2 Wilson, 264.—*Watkinson v. Barnardiston*, 2 P. Wm. 367.—and *Wilkins v. Carmichael*, Douglas, 97.

(10) In *Juslin v. Ballam*, 2 Lord Raymond, 805. I can scarcely conceive that such a determination would be made now, when the same irrational jealousy of the admiralty doth not exist.

were supplied to a foreign ship lying in our ports, though the master was dead and the owners foreigners, yet suit in the admiralty could not be brought against the ship, nor she detained, without an express hypothecation. It has, indeed, been a question noticed by Sir William Scott(11), whether material men, such as ship-builders, rope-makers, &c. may not be allowed to take money out of the proceeds arising from the sale of the ship, and being in the registry or hands of the court, though they would not be allowed to proceed originally against the ship.

With respect to charter-parties, it is said by the highest law authorities, my Lord Coke, in the fourth Institute, p. 135 and 139, and Mr. Justice Blackstone, vol. III. p. 106, that if a charter-party be made in England, and to be executed upon the seas, as that a ship shall sail to such a place, or be in such a latitude on such a day, like any other contract, or covenant, or cause of action, part of which arises upon the sea, and part upon the land, that it belongs not to the admiralty jurisdiction, but to the courts of common law.

A charter-party (which differs from a bill of lading only in this(12,) that the latter is required

(11) In the case of the *Favourite*, 2 Robinson's Admiralty Reports, 236.

(12) Beawe's *Lex Mercatoria*, p. 137.—and see *Forms of Charter-Parties*, p. 134.

and given for a single article, or more, laden on board a ship that has sundry merchandizes shipped for sundry accounts, whereas a charter-party is a contract for the whole ship) may be said to consist of two parts, in the former of which the parties covenant, in the latter bind themselves under a penalty to perform their covenants. And here the clear distinction mentioned in the resolutions of 1632 has been often urged with great force(13), viz. that if the suit was not for the penalty, the admiralty ought not to be prohibited; but Mr. Blackstone, and other writers on the common law, make no such distinction or exception.

As to freight, the master has a lien on the cargo while it remains in his hands, in which case he may retain it till his freight is paid; but it is said, that if he once part with the possession of the goods, he cannot afterwards retake them, or the produce thereof(14), by any admiralty or other process.

The cognizance of policies of insurance was of old claimed by the court of admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of

(13) And in Ireland, as I have known, with success, in the case of the *Jenny of Pingely*.

(14) 2 Lord Raymond, 934. 6 Mod. 12. 11 Mod. 6. But see the determination in *Smart v. Wolff*, 3 Term Rep. p. 323.

the kingdom; and when a court of policies of assurance was erected, in pursuance of the statute 43 Eliz. ch. 2. (which recites the immemorial usage of policies of insurance) parliamentary powers for the same purposes were vested in the commissioners. Sir William Blackstone feelingly laments the want of similar powers in the judges and juries who now usually try insurance causes, and thereby unwittingly, but deservedly, compliments the proceedings of the civil law(15).

As to foreign contracts, or contracts made abroad upon land, in *partibus transmarinis*, though the resolutions of 1632 above alluded to say, in direct terms, that if suit be commenced in the admiralty upon contracts made, or other things personal done *beyond the seas*, or upon the sea, no prohibition is to be awarded; yet it is generally held that prohibition would go, if the admiralty were to attempt to try such foreign contracts; and my Lord Coke says decisively, that if any indenture, bond, or other specialty, or any contract, be made *beyond the sea*, for the doing of any act or payment of money within the realm or otherwise, wherein the common law can administer justice, that the cognizance thereof neither belongs to the lord high admiral, lord high constable, nor earl marshal of England, but to the common law only(16). Notwithstanding this, in a late case

(15) 3 Black. Comm. p. 75.

(16) 4th Institute, p. 134 and 140. He is supported by 1 Roll. Ab. l. 50. Cro. Car. 603. Dubitatur, 2 Roll. 493.

it was held(17), that if an hypothecation bond be executed upon land abroad, it was cognizable by the admiralty, the judges saying that it was absurd to suppose it necessary for the captain to go upon the sea to execute such a contract abroad, and that, in this instance, not locality, but the subject matter, must determine the jurisdiction (18).

And here a distinction must be taken; for if the contract in foreign parts be incident to, and one continued act with, a matter that originally happened upon the sea, over which original matter the admiralty had jurisdiction, the contract also is within its cognizance. Thus, if a ship be taken by pirates upon the sea, and afterwards sold by them on land, that pretended contract of sale would be set aside in the admiralty; and hence there is room for much controversy in such cases, whether such contracts be incident to original acts on the sea, or whether they may not become

and 3 Leon. 232. The sayings of my Lord Coke are the less to be regarded, because, as Mr. Justice Buller has truly remarked, in 3 Term Reports, p. 348, *Smart v. Wolff*, he seems to have entertained not only a jealousy of, but an enmity against, the admiralty; and after he became chief justice, in 1605, the controuls on that court perpetually increased. In fact, Lord Coke could not endure any thing connected with the civil law.

(17) *Menetone v. Gibbons*, 3 Term Reports, p. 267.

(18) 1 Ventris, 308.

severed by some circumstance upon land, as for instance, by sale in market overt(19).

Little then was left for the authority of the admiral to operate upon on the subject of contracts, amidst these curbs so eagerly and rapidly thrown upon him in the last century, save express hypothecations of ship or goods made at sea or in foreign parts, and suits for seamens wages; the attempts to divert which last from his tribunal shall, in the next place, be considered.

Amidst the torrent of prohibitions which poured forth in the last century upon the subjects above-mentioned, and were founded, as I hope presently to shew, more in prejudice than reason, the courts of common law found themselves suddenly stopped in their career by the infinite mischiefs which arose from extending their principle, that no contract made upon land was cognizable in the admiralty, to the cases of seamens wages. The advantages of being able to join all in one suit, of having the ship for their security, and of getting their claims determined in the shortest space of time, which, in the language of the admiralty, is to be between tide and tide, so as to enable them to go to sea again immediately, are so manifest; and

(19) That if goods, even taken by pirates, are sold upon land in market overt, and the vendee acting without fraud be sued in the admiralty, a prohibition goes, is held in 1 Roll. 531. l. 52. and in 2 Brownlow, 29.—1 Ventris, 173. —2 Levyn. 25.—and maintained to be law in *Smart v. Wolff*, 3 Term Reports, p. 336.

the hardship of driving them to their remedy at common law so intolerable, that here these courts were forced to yield, though not without some struggle(20), and to remit the power to the court of admiralty.

This power of that court was recognized by a statute of Richard II. and, at a much later period, by an ordinance of the rump parliament, and allowed to be legal in Serjeant Roll's famous abridgment; and, though disputed after the restoration, was, during the reign of King William, finally established, and never since controverted. It is held that seamen may sue, though the work is done in the river(21), provided the wages are not due by deed or special agreement; because the ship is liable, and they may all join in the suit, neither of which may be at common law, and yet much for the ease of poor seamen(22).

Sir Leoline Jenkins here triumphantly asks, if mariners wages then belonged to the cognizance of the admiralty, why not freight as well, freight being the mother of wages? And, in truth, Lord Chief Justice Holt had no better answer to make to

(20) See Winch. p. 8. 1 Lord Raymond, p. 576. *Alleson v. Marsh*, 2 Ventris, 181. *Coke v. Cretchell*, 3 Levynz, 60. An anonymous case, 1 Ventris, 343. *Clay v. Snelgrove*, 12 Mod. 405.

(21) 2 Lord Raymond, 1044.

(22) *Opy v. Child*, 1 Salk. 31. *Howe v. Napier*.

this forcible reasoning, but this, that it was an indulgence to the poor sailor, and that in his case *communis error facit jus*, as if, says the learned Mr. Douglas(23), any usage or common error could abrogate the statutes which are here supposed to controul the admiralty jurisdiction, or could abrogate a statute to any purpose.

A more plausible reason, however, of this exception, has been given by Lord Mansfield; it is this, that sailors do not, in their demand, state a contract, but go only upon the marine service, and merely give the contract in evidence. But the master's service also is maritime: why is he not allowed to give his contract in evidence against the owner?

In resisting the bringing of suits in the admiralty by other persons of the class of mariners, the municipal courts have still persisted, and the pilot who guides the ship into port(24), the master

(23) Now Lord Glenbervie, in his Reports, p. 102. in his note on the case of *Wilkins v. Carmichael*.

(24) This is ruled, as to the pilot, if his exertions are within the body of a county, as from Sea Reach to Deptford, in *Ross v. Walker*, 2 Wilson, 264. Suppose, then, the pilot was taken on board near the isle of Lundy, in the Bristol Channel—here arises a great dispute between Lord Coke and his opponents. "Wherever you can see from 'shore to shore,'" says the former, "is within the body 'of the county.'"—"Then," say his adversaries, "the sea 'between Cornwall and the Scilly Islands cannot be within 'the admiralty jurisdiction; for they can be seen, or some 'of them, from the coast of Cornwall.'" But, surely,

who governs her at sea, and even the mate, who, by the death of his superior, becomes master during the voyage(25), are excluded from this natural and easy remedy, when refused compensation.

Let us here pause, and, after considering all the matters premised, ask ourselves what is the *rationale*, and what the true principle which ought to govern this question, viz. What contracts should be cognizable in the admiralty? Is it not this? All contracts which relate purely to marine affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings, and particularly those which attach *in rem*, which the common law cannot enforce in that mode, and *in rem only*, for the breach of which the common law cannot give any remedy at all, are or should be properly within the province of the admiralty, whether made upon land or upon water; in other words, that the subject matter, and not locality, should determine the jurisdiction as to contracts.

Is not this the principle laid down by Lord Mansfield, in *Howe v. Napier*, as to seamen's wages,

Lord Coke is speaking of rivers, or creeks, or arms of the sea, not of the shore of the main ocean. The Scilly Islands are part of the county of Cornwall, but the sea there is not of any county. See *Godolphin*, p. 138.

(25) The mate may sue for his wages, but not the master, nor the master's executors. Mate, who afterwards becomes master, can sue in the admiralty only for his wages as mate. *Strange*, 937. 2 *Lord Raymond*, 577. 1 *Salk.* 33.

when contracted for in the usual form, though upon land, and by all the Judges in *Menetone v. Gibbons*, as to hypothecations made upon land abroad(26)? What rational argument can be made against extending this principle to all cases whatsoever? By not doing so, it seems, to my humble judgment, that all the contradictions, inconsistencies, and uncertainty, which to this moment reign over the disputed jurisdiction, have been introduced.

Hence the contradiction of saying, that though the master's contract and service be marine, and even the contract made on the sea, as when he becomes master in the course of the voyage, he shall not sue in the admiralty like the mariners (27)—that a man may raise money on the security of the ship abroad by hypothecation, but not at home—and that contracts not marine made on

(26) I am aware that it may be said, that this decision in *Menetone v. Gibbons* rested on the ground that there was no remedy elsewhere. Is that then the principle, that contracts, though made on land, and under seal, if no remedy elsewhere, are triable in the admiralty? This would be a totally new principle.

(27) It cannot be said, in the case of the mate becoming master by the death of the master at sea, that his contract is on land. His being forbidden to sue in the admiralty is, as is said, because he doth not rest on the credit of the ship. Is that then the principle, that no contract is suable in the admiralty, except that which attaches in rem? Thus, we see the ground has been shifted three times.

sea shall not be affected by locality, contracts marine made on land shall; and that it is absurd, when abroad, to go upon the water to seal a marine contract, but not so at home.

Thus we see, when we leave the plain principle of the subject matter determining the jurisdiction, there is no rest for the sole of the foot; and surely it seems but consistent, that as a contract, though made upon the sea, if not relative to maritime affairs, is triable only in the courts of common law; so a contract made upon the land, if relative solely to maritime affairs, ought to be cognizable in the admiralty: for, as Sir L. Jenkins observes, how can the execution of a charter-party upon land to go from London to Lisbon make a cause a land cause, since the main scope of the charter-party is to be performed on the sea, and nothing of the *undertaker's* business is to be performed upon the land? A writer, in the beginning of the eighteenth century, exactly agrees with my opinion, when he says, "The jurisdiction of the admiralty ought naturally to arise from the nature of the cause, and not from the place where any bargain or contract is made; since it cannot be denied that things may be, and daily are, transacted at land, which have only regard to maritime affairs; and things may also happen to be transacted at sea, which may properly belong to the cognizance of another court."

It cannot be expected, however, that in a didactic treatise of this kind I should venture, ex-

pressly and positively, to deliver doctrines in opposition to those of Lord Coke and Sir William Blackstone; and, therefore, in compliance with the usually received authorities on the point, I have laid down as our first rule, that contracts cognizable in the admiralty must be made upon the sea.

Our next enquiry then must be, What is meant by the sea? By the statute of 15 Rich. II. cap. 3. it is enacted and declared, that the court of admiralty shall have no cognizance of contracts, pleas, and quarrels, or other things done within the bodies of the counties, as well by land as by water. Nevertheless, of the death of a man, and of mayhem done in great ships being and hovering in the main stream of great rivers, only beneath the bridge of the same rivers nigh to the sea, *infra primos pontes*, and no other places of the same rivers, the admiralty shall have cognizance (28).

On the authority of this statute, and of a number of ancient records and decided cases, the common lawyers hold, that by the sea is meant that part of the water which is below low water-mark when the tide is out, and up to high water-mark when the tide is in, for such I take to be the

(28) The statutes 13 Richard II. and 2 Henry IV. will be mentioned in their proper place: they are not introduced here, because they do not go to shew or point out the legal limits of the sea.

meaning of the words, *infra fluxum & refluxum maris*; and accordingly Lord Coke(29) says, "It has been resolved by the whole court, that the soil upon which the sea doth ebb and flow, to wit, between the high-water-mark and the low water-mark, may be parcel of a manor of a subject; and when the sea doth flow unto the full height, the admiral shall have jurisdiction of any thing whatsoever done upon the water, between the high water-mark and the low water-mark; but of every thing done upon the ground when the water is returned, the common law shall have jurisdiction; so that between the high water-mark and the low water-mark, the common law and the admiralty shall have severally power, interchangeable as aforesaid."

The civilians have strenuously contended, on the other side(30), that ports, creeks, and havens, are within the admiralty jurisdiction, and that *infra primos pontes* in the statute 15 Rich. II. cap. 3. are words to be understood literally, while their opponents try to exchange them for *points*, or head-lands, and for *ports*. I am free to own, that in my opinion the common lawyers are clearly right on the whole of this controversy as to the words of the statutes(31).

(29) See Sir Henry Constable's case; Dyer, 326; and Lacy's case, Trin. 25. Eliz. and Exton, p. 136.

(30) See Godolphin, Exton, Jenkins, *passim*.

(31) Sir L. Jenkins admits that the river of Thames, below bridge, viz. at Gravesend, is within the body of the county.

In Moor, 892, a case which, however, speaks particularly of torts, it is said the coasts, shores, and harbours, are out of the power of the admiral, save in two cases reserved by the statute of 15 Rich. II. one of death or mayhem below the bridges, the other of seizing a ship for the king's services. "*Infra primos pontes* is to be "understood only of death or mayhem, not of "actions," says Hobart, 213.

The mischiefs of this triumph of the municipal code in excluding the admiral from his claims to authority in rivers and harbours, are even greater than those which arise from the exclusion of marine contracts made upon the land; and I trust enough has been said to shew the unreasonableness of these limitations and controuls.—It is very observable, that the prize acts speak of the admiral's jurisdiction in rivers, creeks, and havens.

But when we read the statute of 15 Rich. II. above mentioned, and reflect that it was preceded by the statute 13 Rich. II. ch. 5. saying that the admirals or their deputies shall not meddle with any thing done within the realm, but only upon the sea, and followed by the statute 2 Henry IV. cap. 11.(32), giving an action with double damages to the party grieved by prosecuting in the admiralty against the form of said statutes, with ten pounds forfeiture to the king; and the statute

(32) The statutes of Richard II. and Hen. IV. are made law in Ireland, by Poyning's famous act.

27 Eliz. cap. 11, enacting, that all and every of the offences therein mentioned, as thereafter should be done *upon the main sea, or coasts of the sea*, being no part of any county, and out of any haven or pier, shall be tried before the lord high admiral; and that the language of these statutes, though they relate principally to torts, is understood literally by Lord Coke and Mr. Justice Blackstone, and applied to all cases, I have been forced to submit to, and to adopt, the rule laid down by these great authorities, that contracts cognizable in the admiralty must be made upon the sea.—I proceed now to our second rule, viz. that—

*Contracts cognizable in the admiralty must be founded in maritime service or consideration.*

Though, by the former general rule, contracts cognizable in the admiralty must be made upon the sea, it does not follow that this court hath power over all contracts there made. If not relative in any degree to maritime affairs, nor founded on maritime service or consideration, they come not within its sphere. This has been already exemplified by Bridgeman's case, where the captain of a ship seems to have borrowed money from a passenger on his own private account, and not for the purposes of the ship:—so if, on an East India voyage, one passenger should agree that his daughter should be married to the son of another passenger, and thereupon marriage articles or settle-

ments were drawn, no man pretends that any question arising upon their construction would be triable in the admiralty; and thus we find, on a *common* sale or mortgage of a ship at sea, *trover* is the remedy(33).

Here this court willingly concedes to reason, and the common lawyers eagerly accept the concession, and admit, when it makes for them, that locality is no criterion; but when reason commands to invert the rule, and thereby extend it to contracts really marine, though made upon land, they refuse to obey. This obstinate refusal of equal justice hath been so much dwelt upon under the former head, that the reader must not be detained with further animadversion.

But what shall we say to this further encroachment, which I cannot help noticing once more, that the master should not sue in the admiralty for his wages? His contract is marine, his service is maritime. Is the refusal of this short and easy remedy to him, because his contract is made upon the land? Why, then, if he dies at sea, is it extended to his successor, the *hæres necessarius*, whose contract, either express or implied, must arise upon that element? Is it because he rests upon the credit of the owners, not of the ship? Is the principle of prohibition this then, not that the power over all contracts made at land, but over all contracts not attaching *in rem*, is forbid-

(33) *Atkinson v. Maling*, 2 Term Rep. p. 402.

den to the admiralty? This is not said in any book that I recollect. What reason can be given why he should not go upon the maritime service, and give the contract in evidence, as much as the sailors? Or why he should not, if refused payment of his wages by the owners, have the ship for his security as well as they? What stable distinction of jurisdictions can ever here be found, but in the internal nature of the agreement to be enforced?

*Contracts cognizable in the admiralty must not be under seal.*

This rule has been laid down too universally to be controverted, from Bridgeman's case down to that of *Howe v. Napier*. And hence, in obedience to this rule, and to avoid the risk of a prohibition, stipulations in the admiralty of England are not taken under seal: yet in that of Ireland they are. And here let us observe how, upon occasion, common sense will get the better of technical rules. In the case of *Menetone v. Gibbons*, the hypothecation bond was under seal, and the objection was made; but the court said that this rule could not be extended to a case where, from the nature of the contract, the proceedings were confined to the thing in specie, over which the court of admiralty has the sole jurisdiction, and that, in the case before them, the party could have no remedy in a court of common law; for the contract was merely in

rem, and there was no personal covenant for the payment of the money.

But this is not quite conformable to the ground upon which the rule was originally made, which was, that the civilians had different rules for construing deeds from the common law, and required a different number of witnesses to prove it; and, therefore, in *Howe v. Napier*, it was held, that any contract of the sailors, though not under seal, if specially or unusually worded, was triable only at the common law.

From this extended idea of the rule arose the controversy about stipulations, which, if it had terminated otherwise than it did, would have nearly extinguished the admiralty jurisdiction. Lord Coke had declared his opinion that they could not be taken(34); and the common lawyers perpetually confounded them with recognizances, and even after the revolution a prohibition was granted against proceeding on such a stipulation(35); nor was it until the middle of the reign of Queen Anne(36) that a restriction, so totally destructive of the very existence of the court, was totally given up by the courts of law.

In fact, in former times the admiralty had been in the practice of taking recognizances like the courts of record, which produced so many prohibitions; and it was at one time a great subject of

(34) 4 Inst. 135.—(35) *Knight v. Perry*, Comberbach, 109.

(36) *Degrave v. Hedges*, 2 Lord Raymond, 1285.

complaint, and was declared illegal by all the judges(37). In consequence of that resolution, it should seem that the court of admiralty had adopted the stipulation now in use, which is sufficiently distinguished from a recognizance taken in a court of record(38), and which the courts of common law, from a conviction that something of the kind was absolutely necessary to maintain the admiralty jurisdiction, at length approved of in *Par v. Evans*, 15 Car. II.(39). The very ground of its jurisdiction appears from this instrument to be the consent of the party; and though it subjects his person and goods, it does not enable the admiralty to issue process against his lands.

*Contracts operating solely in rem are especially and peculiarly within the province of the admiralty.*

The reason is, that this court proceeds in rem, whereas the common law can only proceed against the parties; thus in the case of hypothecation, the parties are not personally bound, the proceeding is confined to the thing in specie, and therefore there is no remedy against the parties, and consequently none at the common law(40).

(37) 4 Inst. 135.

(38) This is the language in *Smart v. Wolff*, 3 Term Reports, p. 337.

(39) *Sir Thomas Raymond*, 78. 1 Keble, 489—500, 515, &c.

(40) See the words of Lord Kenyon and Mr. Justice Buller in *Menetone v. Gibbons*, 3 Term Reports, 269 and 270.

This remedy *in rem* against the ship or goods is founded on the practice of the civil law, which gives an *actio in rem*(41), to recover or obtain the thing itself, the actual specific possession of it; whereas, with us, things personal are looked upon by the law as of a nature so transitory and perishable, that it is for the most part impossible either to ascertain their identity, or to deliver them in their original condition; and, therefore, the law contents itself with restoring, not the thing itself, but a pecuniary equivalent in damages.—3 Blackstone's Comm. 146.

It may be asked, perhaps, Do not the actions of *detinue* and *replevin* restore the specific possession of the *res* to its proper owner? True; but this is restoration, and to the owner. Previous property is necessary in the plaintiff suing for possession; and if the defendant sets up property in himself, or in another, and proves it, the plaintiff is defeated. But the admiralty jurisdiction gives this remedy *in rem* to the person having only an hypothecatory right, as in the case of seamen's wages.

(41) Though this is sometimes called *actio realis*, how entirely it differs from our real actions has been shewn in the view of the civil law in the former volume.

*Whether mere personal contracts, if maritime, are or ought to be cognizable in the admiralty?*

Reason would instantly determine this question affirmatively; though, if the jurisdiction of the admiralty court is to be strictly and literally confined to contracts made upon the land, this question is of little importance, because it can scarcely happen that such a contract should be made on the middle of the ocean, or that there should be any occasion for there forming it. But the courts of common law have, by prohibitions not founded in any system, nor fraught with any consistency, involved the subject in endless perplexity. They have allowed suits on personal contracts in this court, though made upon land, in various instances, and yet prohibited them in others not varied by any circumstance authorizing such a diversity of decision.

The general rule however at present is, that the admiralty acts only *in rem*, and that no person can be subject to that jurisdiction but by his consent, expressed by his entering into a stipulation.

Thus it is expressly said in Keble's Reports(42), that without a stipulation the admiralty has no jurisdiction at all over the person; and it has been added, that the consent of the common law courts to its taking this security was given, though un-

willingly, from their sense of its absolute necessity to bind the person. Thus again it is said, in Godbolt(43), that the first process in the admiralty is against the ship and goods; and that the libel must not be against the person.

And Mr. Justice Buller has observed (when giving a reason why the admiralty should be allowed to proceed on an hypothecation bond sealed abroad, because the common law could give no remedy, there being no personal covenant for the payment of the money), that in the struggles between the court of admiralty and common law courts respecting the extent of their respective jurisdictions, the latter have said, that if the parties have *bound* themselves to answer *personally*, the former cannot take cognizance of the question; and in a suit in the admiralty by one part-owner to oblige another to sell a ship, Chief Justice Lee said (on an application for a prohibition), that court has no such power, for that would be proceeding *in personam*(44).

In the case of *Smart v. Wolff*(45), which was, it is true, an application for a prohibition to the prize court, but the reasoning in which applies equally to the instance court, a captured ship had been restored as a neutral, but the goods had been condemned as prize, and delivered to the captors. The master of the captured ship, or his agent on his behalf, instituted a suit in the admiralty against

(43) Page 64. (44) 1 Wilson, 100. (45) 3 T. Rep. 323.

the owners, or agents of the owners of the capturing privateer, to bring into court the produce of the goods remaining in their hands to answer his freight.

No fidejussory caution had been taken before the goods were delivered to the captor, but the question of freight had been reserved by the terms of the decree for further consideration. A prohibition was applied for.

For the prohibition it was insisted, that after the delivery of *the thing* itself, the jurisdiction of the admiralty ceases, unless it be prolonged by the consent of the party, and his entering into a stipulation. That this court has no hold upon the party except by consent. That it has always been admitted by civilians, as well as common lawyers, that the admiralty has no jurisdiction where the thing itself is out of their custody.

On the other side it was said, that the prize court has jurisdiction over every person who obtains possession of the proceeds of a prize, and that there was a material distinction in this respect between the instance and prize court; the former proceeds originally by arrest, in order to compel bail to be given to submit to its jurisdiction: but the jurisdiction of the prize court is founded on a higher authority, it is founded on the right to enforce the law of nations.

The court observed, that the suggestion supposed that the motion issued against the defendants, as owners of the privateer, or agents for her captain.

—No such thing, the proceedings were founded on the plaintiff's having possession of the proceedings; if they had not then such possession, the court admits they could not be sued, and were not *personally* liable. The suit was *quasi in rem*.

In consequence of these and similar positions maintained in the common law courts, the admiralty has in a great measure dropped its claim to taking cognizance of charter-party and freight, and suits by material men, and almost all other proceedings upon contract, except those for recovery of seamen's wages, or enforcing bottomry bonds. Let us now see how far this restriction is consonant to reason, and whether this mode of interference by the law courts can be reduced to any rule or to any consistency.

Every argument which has been used for extending the jurisdiction of the court of admiralty to contracts in their nature maritime, though made upon the land, applies to them also though affecting the person; the principle of jurisdiction ought not to depend upon locality, nor upon the *object* affected, but upon the *subject* matter of the contract. I cannot express my idea more clearly, though concisely, as to the reason of the thing, upon which longer to dwell would be only to repeat arguments already urged, though with a different aspect.

The opposition of the law courts to this principle is here as it was with respect to locality, not only irrational, but inconsistent. They suffer

seamen every day to proceed, not merely against the ship, but against the master and the owner. Upon what ground? Is it not on their personal contracts expressed or implied? Do they say that here, as before with respect to locality, that limits are passed from peculiar indulgence to seamen, and that *communis error facit jus*; we answer as before, that no error can make law; and we ask, as formerly, why then in consistency is not the same indulgence extended to the master, in a suit against the owner; and to the mate becoming master, whose contract, as well as service, are on the sea?

The master cannot sue in the admiralty, because he is supposed to stand on the personal credit of the owner, not relating to the bottom of the ship(46); on what other footing doth the sailor stand, if the ship and cargo are gone, as we will suppose sent away upon another voyage before he could arrest her, or stolen away and the goods embezzled by the master who flies? The owner cannot even be pretended to have any of the proceeds in his hands(47). Yet that the sailor hath

(46) This is said in a thousand cases. See 2d Robinson, p. 23.

(47) The words of the text are guarded, because it may be said, if the ship be lost so are the wages, and if the owner be suable it is not personally, but as having the freight and proceeds in his hands. If it be answered, that the owner is sued, because he ought to have the proceeds in his hands, and is answerable for employing a fraudulent master, and

his triple remedy against ship, master, or owner, is never disputed.

To complete the confusion in which this subject hath been involved, the court of admiralty is permitted to arrest the person in some instances of personal contract, to compel a stipulation on which its jurisdiction is to be founded.

When the old doctrines and process of the civil law were followed, as they were when Clarke wrote his practice, and even in the time of Sir L. Jenkins, this was intelligible; the party was arrested to compel an appearance, but if he obstinately refused to appear, though the court might not be able to proceed to definitive sentence(48,) it proceeded for defaults against all or any part of his property, at least against his goods; but this did not imply want of jurisdiction, any more than the old common law process by summons and distress infinite, or the

that it is a proceeding *quasi in rem*, and not charging him personally, this is rather too subtle for common comprehension.

(48) This shall be fully explained when we come to speak of practice. Clarke seems even to imply, that a final sentence may be had; for he says, "the party shall be imprisoned pendente lite." If the admiralty will support a quantum meruit, or something analogous to that legal count, for some services done upon the sea: I say, if this may be done in one case, why not in all, to be consistent? In the case of the *Favourite*, 2 Robinson, p. 232, the mate succeeding to the office of master, was allowed to sue as mate during the whole time.

present admiralty process *in rem*, for defaults, implies want of jurisdiction. But now it doth not appear intelligible, in cases of personal contract, upon what ground the person, though it may be taken for a contempt in not appearing, is detained, for refusing to enter into a stipulation to submit to a court, which hath no previous jurisdiction to try personal contracts till that stipulation be entered into. Yet this is the case of master or owner, where the ship cannot be had. Without his consent he may be arrested, and if he will not enter into a stipulation to submit to the jurisdiction, imprisoned while he lives for breach of a personal contract expressed or implied, and yet the admiralty court has not jurisdiction over personal contracts. Who can reconcile these discrepancies?

The present practice on this point we must acknowledge is, that no suit has been brought on any personal contract for very many years past. This is said on the special authority of a gentleman who was very eminent as registrar, added to the general enquiries of the author. Yet even where proceedings cannot be had against the person originally, they may against the person as having the proceeds of the ship or cargo in his hands, for this in fact is *in rem*, as in the case above-mentioned of Smart and Wolff; yet even so the master is not permitted to sue against proceeds in the registry. 2 Robinson, p. 239.

To sum up all that has been said on contracts,

it has been delivered as my humble opinion, that the only method of forming any rational or consistent system on the extent and limits of the admiralty jurisdiction over contracts, and of getting rid of all the contradictions and inconsistencies in the books, would be by adopting universally, the rule applied in the two memorable instances of Howe and Napier, and Menetone and Gibbons, that the subject matter, and not locality, should here determine the jurisdiction; and I have been unwillingly forced to submit to authority, in allowing that besides marine service, or maritime consideration, execution or making on the sea, and the absence of a seal, and operation in rem are necessary in contracts, to found the jurisdiction of the admiralty, which is excluded from trying them if personal, or sealed, or made on land.

I shall conclude this head of contracts with the two following general rules: Where the admiralty court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. And *vice versa*, if it hath jurisdiction of the original, it hath also of all incident or consequential questions, though properly determinable at common law.

#### TORTS.

We proceed in the next place to consider the jurisdiction of the instance court as to torts; that

is, as to *private* wrongs, for *public* will come under our consideration when treating of the criminal court.

Private wrongs may be either to the person or the property; though no doubt was ever entertained as to the power of the admiralty to punish criminally wrongs to the person, as assaults, batteries, false imprisonments committed on the high seas. Whether the admiralty hath now any criminal jurisdiction, except under the statute of Henry VIII. and whether its old powers *quo ad hoc* be obsolete, will be considered hereafter in cap. 11th. Yet difficulties have been started as to their power of giving damages or compensation *civiliter* for such like injuries. These difficulties seem to be overcome and answered by the following cases amongst others.

In a case mentioned in the letters of Sir L. Jenkins, where a vessel had by violence been forced out of its course, that learned judge declares, in reply to queries from the lords of the admiralty, that the persons on board may maintain in that court what he calls an action of damage, for their loss of time, and other injury done them(49).

In Caton and Burton, Cowper, 330, a suit appears to have been instituted in the admiralty for an alleged assault on the high sea, and only prohibited because it appeared to have been committed not at sea, but *infra corpus comitatus*.

(49) Sir L. Jenkins, Vol. II. p. 774.

In the case of *Le Caux and Eden*, this question was discussed incidentally. The question there was, whether an action at common law could be maintained for an imprisonment on a capture at sea, *as prize*? and it was determined that it could. In the course of the argument it was strongly urged for the action, that there was no remedy in the court of admiralty, and that no instance could be adduced where that court had taken upon itself to assess damages for assaults, imprisonment, or any injury done to the person; and it was asked how they could without the intervention of a jury.

On the other side it was insisted, that though perhaps no distinct case could be mentioned of damages assessed in that court, *eo nomine*, for personal injuries, yet the standing interrogatories shew, that in answering them, any personal injury may be stated, and *querelles* upon the sea, 4th Institute, p. 134. seem to include personal trespasses, and 1 Roll. 250, was appealed to.

Mr. Justice Willes said, "he saw no reason "why the admiralty might not judge of injuries "to person as well as to property, and ascertain "damages by reference to the registrar, who can "call in assessors(50)."

It may perhaps be said, that in the last case the injury was triable as incident to a question

(50) The civil law, even in civil cases, was not altogether destitute of the aid of a jury, though not by that name.

of prize, but the reasoning is general, that the admiralty can assess damages; and Mr. Justice Blackstone is clearly of opinion, that *injuries* committed on the high sea, are only to be remedied, to use his words, in this peculiar court of their own(51).

Accordingly, actions for damage done by assaulting the person, are extremely frequent in the instance court of admiralty, and have been so from time immemorial, as we see in the *Liber Niger* of the admiralty; such injuries are also punishable criminaliter, by another branch of the same court, viz. by discretionary fine(52).

We may therefore hold it as ruled, that civil or private injuries to the person, committed on the seas, are remediable in this court; but here, and in all matters of tort, locality is the strict limit. There can be no variety in the subject matter of torts. They cannot, like contracts, relate some to terrene, some to marine affairs.—Nor have a double aspect like them, which, though made on land, may relate entirely to the sea. Treason, murder, battery on the water, must be the same in their nature and in their punishment, whether committed by land or by water. All that we have said, therefore, of the subject matter being the proper criterion of jurisdiction, related only to *contracts*. In *torts*, locality ascertains the judicial power.

(51) 3 Black. Com. p. 106.

(52) See 27th article *Magistri Roughton*.

Injuries to property committed on the sea now claim our attention. They may consist either in damage or in asportation; in destroying or lessening the value of the property, or in taking it away.

The instance of damage to the property, on which cases most frequently occur, is that of collision, or ships running foul of one another, by which one or both are sunk or battered.

For this damage, if done at sea, remedy may be had in the admiralty, but not if it happen within the body of a county. That in the last case prohibition would go, is ruled from the case of *Violet and Blague*, Moor 891, down to *Velthason v. Ormsby*, 2d Term Reports, p. 315(53): but rescue of a ship in a county (previously and rightly arrested by admiralty process) is cognizable there. *Rigden v. Hedges*, 1 Lord Raymond, 446.

In the case above mentioned from Moor, which speaks of torts, it is said, the coasts, shores, and harbours, are out of the power of the admiral, save in two cases reserved by the Stat. 15 Richard II. one of death or mayhem below the bridges; the

(53) The mischief done by this determination on the river Thames is inconceivable. Suppose the damage done by a foreign ship. The admiralty is not permitted to arrest her. The law courts have no such process. The owner lives abroad. The captain instantly sails away. We are not on a par with foreigners, for they, in every country of the continent of Europe, would instantly seize one of our ships for a similar offence.

other of seizing a ship for the king's service ; and yet the prize acts, and even that of 1793, speak of the admiral's jurisdiction in creeks, rivers, and havens.

Whether in such case the courts of common law have a concurrent jurisdiction(54), may have been doubted, but I think it is clearly settled in practice that they have, where the proceeding is not in rem, but merely for damages ; though Sir Leoline Jenkins expressly says, that to bring an action of trover for a tort upon the high seas, is an invasion of the authority of the admiralty ; and alleging, that causes of spoil are cognizable in the admiralty, adds, that it has always been so till some late interruption, and that it is not without special ease and satisfaction to a foreign plaintiff, that he shall have the benefit of the same marine laws here, that we are judged by in his country ; and instead of entering as many actions of trover and conversion as there are parties to the spoil, and proprietors of the ship and goods, which might be one hundred actions at common law, the master, in the name of himself, his settlers out and freighters, need enter only one single action in the admiralty, where one hearing, plea, trial, and one sentence (as well in vacation as in term time) will determine the whole affair. 2 vol. 764.

(54) In *Addison v. Overend*, 6 Term Reports, p. 766, trespass was brought for running down the plaintiff's ship, but it is not said whether it happened in port or at sea.

As to the asportation, or any actual possession of the ship of another obtained upon the high seas, if felonice or piratice, it is a public crime which will come under our consideration when treating of the criminal court—if it has been in consequence of a taking *as prize*, though the ship, from want of legal condemnation, has not become a real and complete prize, I conceive that any claim of restitution must be brought in the prize court, and doth not at present come within our view, though it shall hereafter. If we conceive an illegal possession obtained of the ship in any other way(55), a suit for restitution is proper in the instance court.

It is not easy, indeed, to conceive such a case, unconnected with either piracy or capture in war, though it hath not been unusual, where a British prize has been sold abroad and afterwards has made a voyage into this country, for the former owner, claiming *jure postliminii*, to libel in the court of admiralty, (particularly in Ire-

(55) An instance of this occurred in *Graves v. Sawear*, Sir T. Raymond, 15, where the plaintiff was owner of one part of a ship, the defendant of another part; and the defendant fraudulently carried the ship, *ad loca transmarina*, and disposed of her to his own use. The ship being gone, there was no proceeding in rem. An action on the case was brought. The plaintiff failed because the parties were tenants in common. Query, Whether in such case the defendant might not have been sued in the admiralty, as having the proceeds in his hands?

land where there is no prize court,) as for an illegal taking at sea, dropping the mention of prize and capture altogether; so as to make it on the face of the libel, before an exception to the jurisdiction comes in, appear like a case for the instance court(56). We may, however, suppose or imagine a case of possession unlawfully taken, where no circumstance of capture in war was concerned, as if there was a disputed property in a ship, and one of the claimants prevailed upon the master at sea to betray to him the possession previously held by the other. In such a case, a suit by the latter in the admiralty for restitution, would be fit and proper *omnibus numeris*.

Such a suit formerly was either petitory or possessory(57), claiming the right of property,

(56) Some very able men think indeed that such would be a case for the instance court, and that the question of prize comes in only incidentally; but surely taking *as* prize, though illegally, or purchasing from such a taker, is equally a question for the prize court, as legal capture and purchase thereof; and accordingly the case of the *Perseverance* Pittar, in 2d Robinson's Reports, which was of the former kind, was tried in the prize court. See also the case of the *Flad Owen*, 1 Rob. 135, and of the *Kierlighett*, 3 Rob. 96.

(57) See a possessory suit in the admiralty, mentioned in *Strange*, 936, and a petitory, 1 Shower, 179. These distinction, well known to our, and to all laws, because founded in the nature of things, will be more fully and properly explained when we come to treat of *practice*. A suit by owners for seizing or taking a ship is now always possessory.

or the right of possession, or both might be united; in which case, the promoveat having proved in the first instance an unjust invasion of his possessory right, might have the possession restored to him immediately by an intermediate incidental possessory decree, like the *lis vindiciarum* of the civil law, the right of property to abide the ultimate event of the suit; or the defendant, in answer to the claim of property, might set up a claim of possession, to which the other may reply, that it was by violence.

But for a very considerable time past, and even as far back as a period not very long after the restoration, the court of admiralty was told by other courts, that it had not jurisdiction to examine and pronounce on *the title* of ships, in questions of *ownerships*; since that time the court has been very cautious not to interfere at all in questions of this nature. But where the consideration of property comes in incidentally, and in such a manner as is not disputed between the parties, the court doth judge, though the question of property can hardly there be said to be before it, but the suit always purports to be instituted in a possessory cause, civil and maritime.

Though such suits for restitution be proper in the admiralty, yet it may well be asked, whether the courts of common law have not here concurrent jurisdiction, for though the tort be committed upon the sea, the main question is a simple question of possessory right between man and man,

and which in its nature savors not necessarily of a marine business(58).

Lord Mansfield has answered this question in the case of *Lindo and Rodney*(59). "A thing," says he, "being done upon the high sea, doth not exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; though for taking *as prize* no action will lie. The nature of the question excludes not "the locality."

The proper distinction seems to be, that if the suit be in rem, for the restitution of the ship itself, the suit should be in the admiralty; if for damages only, at common law. But Sir L. Jenkins agrees with the attorney and solicitor-general of his time in opinion, that even for *spoil and damage*, and loss of time or demurrage, occasioned by violence, suits might be brought either in the courts of common law, or in the admiralty; but he adds weighty reasons for preferring the latter. "Having," says he, "the authority of two such eminent persons in the law, that this cause of spoil is cognizable in the admiralty, I will only add, besides, that it has been always so, till some late interruption; and that it is

(58) A mere dispute about a ship doth not make a marine business. When a ship is mortgaged at home, or taken in execution by the sheriff, we think of it merely as of any chattel, like a house.

(59) In a note, Douglas, 592.

“not without special ease and satisfaction to a  
“foreign plaintiff, that he shall have the benefit  
“of the same marine laws here, by which we are  
“judged in his country; and instead of entering  
“as many actions of trover and conversion, as  
“there are parties to the spoil, and proprietors  
“of the ship and goods, need enter but one single  
“action in the admiralty(60).”

In many cases of this kind an action of trover has been brought(61), and in others, the language of the court seems to imply, that this or replevyn was the more proper method(62).

If the taking be *infra corpus com.* of course the admiralty has no jurisdiction, and this was the case of *Violet and Blague* in *Moor's Reports*, in which a ship was taken possession of at Limehouse by a person claiming right thereto.

When formerly the admiralty was permitted to try petitory suits, or causes of property directly, it was held that the sentence of the admiralty on

(60) *Sir L. Jenkins*, 2 Vol. 764 and 774.

(61) See *Hughes and Cornelius*. *Sir T. Raymond*, 473. and *Skynner*, p. 59. and also *King and Broom*, 12 Mod. p. 134. and *Brown v. Franklyn*, *Carthew*. 474. and *Violet and Blague*. *Moor*, 891.

(62) See what Lord Holt says in *Tremoulin and Sandes*, 12 Mod. and 1 Ventris, p. 308. Other cases on this subject are, *Lister and Baxter*, *Strange*, 693; *Johnson and Stepney*, *Holt*, p. 48; and 1 *Shower*, 178; *Edmonson and Walker*.

the property of a ship taken upon the sea was final, and it should not be afterwards tried in trover(63).

Now suppose property thus illegally taken has been sold in open market, it is said that it doth not appertain to the admiralty to try the right of possession of the ship, being sold upon land(64); and an action has been brought for bringing such a suit in the admiralty(65), and it has been ruled that this court cannot try a taking and conversion on land, following an illegal taking at sea.

The ground of these determinations seems to be that where the admiralty has cognizance of the principal, it hath also of the incident; yet that is only where the whole makes one *continued* act, and here the purchase is *severed* from the first taking, and it becomes a mere question of property on land. But this seems subtilty; the sale is surely a continuation of the violence, and as we see that in the prize court the validity of such a sale after a capture in war would be tried as inseparable from the prize question, why should not the same rule apply in the instance court to takings, not by an enemy.

I conclude by considering the jurisdiction of this court as to foreign ships, and foreigners, and by adding one observation more on the inconveniencies arising from restraining its jurisdic-

(63) 3 Mod. 194.

(64) 1 Croke, 685. anonymous.

(65) Radley v. Egglefield, 1 Ventris, 173.

tion, not only on the land, but even over things landed.

It doth not seem possible to draw an exact line about the jurisdiction which this court will exercise as to foreigners. It must depend on the nature of the question. If it arises from the particular institutions of any country, to be applied, and construed, and explained, by the particular rules of that country, it will not be entertained. Such is a question arising upon the contracts of mariners(66), who will be remitted to their own forum.

But where the question is one of the *jus gentium*, to be determined by sound discretion, acting upon general principles, the court will hold plea of it; and such that of salvage seems to be, according to the inclination of the mind of the court in a late case. It is said also, that suits on bottomry have been often entertained in this court between an Englishman and a foreigner, or between two foreigners.

I have already expatiated on the evils arising from confining the admiralty civil jurisdiction literally to the sea; but what pretence can be offered, when it has obtained jurisdiction, for eluding it by a fraudulent landing of the things in question? Yet such tricks have frequently been attempted as to wreck, derelict, &c. the parties

(66) Another reason also has been given, because the contract for wages cannot be the subject of a suit till the return or end of the voyage.

being amused with negociation till the things were landed ; though it is reasonable to hope that in such case, at least, of manifest contrivance to evade substantial justice, no court of common law would uphold the fraudulent contriver(67).

The last branch of jurisdiction I shall mention is, that of enforcing the judgments of foreign courts.

One judge must not refuse, on letters of request, to execute the sentence of another foreign judge, when the persons or goods sentenced are within his jurisdiction ; and if he do, his superior must compel him to it, otherwise it is a sufficient ground for reprisals. He may, however, on account of what he judges to be nullities, suspend execution if he sees cause, but he must not pronounce upon those nullities, nor upon the merits of the principal cause(68).

That a sentence of the admiralty in *partibus transmarinis*, may be executed by the admiralty here upon the receipt of letters missive for that purpose, has been ruled in various cases, and also that the party may be imprisoned here by process of the admiralty in execution of a foreign sentence, and is not entitled to an habeas corpus(69).

(67) Among smaller powers in this court given by statute, is one to license cutters, &c. to escape the penalties of the hovering acts. See 24 Geo. II. and 38 Geo. III. ch. 33.

(68) Sir L. Jenkins, 2d vol. p. 762.

(69) 1 Roll. 530. 1 Ventris, 32. 2 Levynz 267.

And though the sentence of the admiralty *in partibus transmarinis* was for a matter upon land, yet a prohibition doth not go to the admiralty here which executes such sentence, if nothing further is done, for the court will give credit to the sentence there(70); as if a foreign admiralty adjudge a ship to be a prize, after a sale here upon land, a prohibition shall not go, for it is only an execution of the sentence which adjudged it to be a prize. But if there be a suit in the admiralty to execute a sentence in a foreign court, not final, a prohibition will go(71).

The sentence of a foreign court of admiralty is only conclusive as to the express grounds of sentence, and not as to any of the premises, which might have led to the adjudication(72).

A sentence in a foreign court of admiralty condemning a neutral ship as navigating contrary to the ordinances of a belligerent state, to which ordinances that neutral power had not assented, has been ruled not to falsify a warranty of neutrality in a policy of insurance(73).

The result of our enquiries in the present chapter, as to the extent of jurisdiction in the instance court of admiralty, which is at present seemingly allowed by the law courts, is, that it is

(70) Raymond, 473. 1 Leonard, 267.

(71) Jurado *v.* Gregory, in Ventris.

(72) Christie *v.* Suretan, 39 Geo. III.

(73) Pollard *v.* Bell, 40 Geo. III.

confined in matters of contract to suits for seamen's wages, or those on hypothecations; in matters of tort to actions for assault, collision, and spoil; and in quasi contracts to actions by part owners for security, and actions of salvage; but if a party institute a suit in that court on a charter-party, for freight(74), in a cause of average and contribution, or to decide the property of a ship, and be not prohibited, I do not see how the court could refuse to entertain it; and I have some reason to think that this my opinion is supported by very high authority.

(74) There was, so lately as in 1764, a suit for freight, *Hayes v. Giovanni*, in the vice-admiralty court of Gibraltar, and to this day in Ireland, suits on charter parties, and by material men, are often brought, and no prohibition.

## CHAPTER V.

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### ON THE LAW OF THE INSTANCE COURT.

THE law which governs the instance court will be most conveniently viewed in its application to the subjects there cognizable, which are principally the regulations of shipping, the powers, duties, and rights, of the persons concerned or employed in the same, viz. owners, masters, and mariners; the contracts entered into by or with these persons; and the torts committed by or upon them, or the damage done to the ship.

In giving a sketch of this law, one manifest difficulty occurs of no small magnitude. Britain never has, like France, collected into one single grand ordinance its civil marine law. I term it civil, to distinguish it from the prize law or code of war. The former, therefore, must be gleaned from its dispersed statutes; and where they are silent, from the old maritime laws of other countries, as far as they have been received in this; how far they have been so received can only be ascertained by determined cases; and where they are wanting,

a commentator can only give those parts of the ancient maritime law which appear so consonant to reason, that they undoubtedly would guide in cases yet unsettled, or which from his own experience he knows to be usually received as law.

Questions relative to the ship itself usually occur incidentally in controversies respecting contracts or torts, as, Whether she has been properly registered, and where? Whether she has her proper papers, and whether she be manned according to law? The law as to registry, and the usual and requisite ship's papers, with the purport of the navigation act, shall here be mentioned. Other questions of less importance may be infinite, and refuse enumeration.

It is very true, that a ship offending against the provisions of the navigation act, and thereby liable to forfeiture, may be proceeded against by information; or by seizure and prevention, by the officers of the revenue; but these offences also come directly before the court of admiralty(1), by appeal from the vice-admiralty courts in the West Indies on matters of revenue, and relating to the

(1) By the navigation act, all admirals and commanders of king's ships are authorized to seize and bring in, as prize, ships offending against that law, in the plantations in Asia, Africa, or America, and to deliver them to the *court of admiralty*; and, in case of condemnation, one moiety of such forfeiture is to go to the admiral or commander and his company, to be divided as prizes are; the other moiety to the king.

navigation acts. It will be every day found necessary for the practitioner in that court to have a general idea of them.

It is well known, that the jealousy entertained by England of the Dutch carrying trade during the time of the usurpation, which afterwards burst out into a furious war in the reign of Charles II. was the origin of the famous navigation act, which originated in the former, and was ratified and improved in the latter period.

The principle and policy of this and subsequent acts were to encourage our own shipping, by providing that no goods or commodities of the growth, production, or manufacture of Asia, Africa, or America, should be imported into Great Britain in any other than in British built ships(2), or in British ships owned by his majesty's subjects, and navigated by a master, and three-fourths at least of the mariners, British subjects; and that such goods or commodities should not be shipped or brought from any other place or country, but only from those of their growth, production, or

(2) It is remarkable, that in the ancient statutes of the admiralty, in the black book, we find the principle of the navigation act.—“*Inquiratur de his, qui conducunt et onerant naves exteras sive alienigenas, ubi possunt pro rationabili salario conducere naves domini regis subditorum quia tenentur navigium generale istius regni specialiter manu tenere & sustentare aliis navibus alienigenarum spretis & relictis; qui secus fecerint gravem finem domino admirallo facient in hac parte.*”

manufacture, or from those ports where they can only, or are, or usually have been, first shipped for transportation; and that no European goods should be imported but in such ships, and so manned as above, unless in ships of the built of the country or place in Europe under the dominion of the sovereign of the state of which such goods are the growth, production, or manufacture, or of the built of such port where the said goods can only be, or most usually are shipped for transportation, and navigated by a master, and three-fourths at least of the mariners, of that country, place, or port(3).

And with respect to the coasting trade, the law is, that no person may lade or carry on board any ship or vessel, other than a British ship owned by British subjects, and navigated by a master, and three-fourths at least of the mariners, British subjects, any commodities or things, of what kind soever, from one port or creek of Great Britain or Ireland, or of the islands of Guernsey or Jersey, to another port or creek of the same, or any of them.

The law, as above stated, makes it necessary to enquire what constitutes a British built ship, and what a British ship; and this is principally an-

(3) I have here given the general principle. The vast variety of exceptions, modifications, and additions to the original provisions of the navigation act, must be sought in works expressly and solely on the subject. Mr. Reeves's Law of shipping forms an excellent epitome of them.

swered by statute 26 Geo. III. ch. 60. A British *built* ship is such as has been built in Great Britain or Ireland, Guernsey, Jersey, or the Isle of Man, or in some of the colonies, plantations, islands, or territories in Asia, Africa, or America, which, at the time of building the ship, belonged to or were in the possession of his majesty; or any ship whatsoever which has been taken and condemned as lawful prize.

Except such British built ships as shall be rebuilt or repaired in any foreign port or place, to an amount exceeding fifteen shillings per ton, unless such repairs shall be proved to have been necessary to enable the ship to perform her voyage.

A British ship may be first, such as is foreign built, and which before 1st May, 1786, belonged wholly to any of the people of Great Britain or Ireland, Guernsey, Jersey, or the Isle of Man, or of any colony, plantation, island, or territory in Asia, Africa, or America, in possession of his majesty.

Secondly, such as has been built or rebuilt on a foreign-made keel or bottom, and registered before 1st May, 1786, as a British ship.

Thirdly, such as had begun to be repaired or rebuilt on a foreign-made keel or bottom before 1st May, 1786, and has been since registered, by order of the commissioners of the customs in England or in Scotland.

We next proceed to consider the law as to registry, which is, that every ship or vessel having a deck, or being of the burthen of fifteen tons,

and belonging to a subject of Great Britain or Ireland, Guernsey, Jersey, or the Isle of Man, or any colony, plantation, island, or territory, to his majesty belonging, must be registered by the person claiming property therein, who is to obtain a certificate of such registry in the port to which the ship or vessel properly belongs.

Without this certificate of registry, the ship cannot be entitled to the privileges of a British built ship, but is liable to forfeiture; and her being the property of a British subject doth not prevent her being considered as an alien ship.

If a certificate of registry be lost or mislaid, or if a ship shall be altered in form or burthen, or from any denomination of vessel to another, she must be registered *de novo*, and a new certificate granted(4).—Prize ships are by statute entitled to be registered as British ships.

The 36 Geo. III. ch. 112, authorizes his majesty to order the registering of ships recaptured. The 37 Geo. III. ch. 63, grants to foreign ships, put under his majesty's protection, the full privilege of prize ships as to registry.

(4) On the principle of this provision, some tricks have been endeavoured to be founded, by adding some trifling repairs, and newly registering ships taken as prize; and then, though no condemnation, insisting that the property is altered. Perhaps, in such case, some allowance may be asked from the original owners for the expense of repairs, but the ship must be restored.

The ship's papers with which we ought to be acquainted are chiefly these:—1st. A pass or passport, if necessary, to prove neutrality. 2dly. The ship's registry and certificate thereof, as above. 3dly. The manifest, giving an account of the cargo, and its contents particularly. 4thly. Charter-parties and bills of lading. 5thly. Custom-house, papers, clearances, &c. 6thly. The ship letters, giving an account to the correspondent of the contents and destination of the cargo. Because, from a thorough investigation of these, the fairness of the transaction, particularly in cases of prize, can generally be ascertained; and also in causes in the instance court, involving questions of possessory right, the examination of them may be very necessary.

By the Irish act, 27 Geo. III. ch. 23. it was enacted, that the English navigation act should be in full force in that kingdom; but it had been before directed to be observed by the new rules: and a great lawyer, Sir William Jones, soon after the navigation act was passed, being consulted, gave his opinion, that a ship built in Ireland, and a captain or mariner having a domicile in Ireland, were within the intention of the act.

The strictness of the navigation acts is frequently departed from in time of war, from necessity; as for example, by the act 13 Geo. II. ch. 3, and 36 Geo. III. ch. 76. There are many most material new regulations by 34 of Geo. III. ch. 68, which also describes accurately who are British sailors and masters.

*OWNERS.*

Where a ship appertains to a single proprietor, little can occur that is necessary to be mentioned in an admiralty treatise. His duties in not disobeying the laws of the land, made against smuggling in time of peace, and against contraband in time of war, are as extensive as those laws, and do not come within the bounds of my design. The provisions of the act of navigation which he is bound to obey have already been generally treated of, and to them I must add a minor regulation, viz. that he is obliged by those acts, in conformity with the old maritime laws, to cause the name by which the ship is registered to be painted on a conspicuous part of the stern, and this name not to be changed.

But the chief controversies relative to owners, which can come before the court of admiralty, are between part-owners, where there is a society in proprietaryship.

Here frequently a perverse owner may endeavour to embarrass his partners by refusing his consent to a beneficial voyage, in which case the other part-owners are obliged to go into the admiralty to obtain a decree in favour of the voyage, they entering into a stipulation for the safe return of the ship. It was an instance of this kind(5),

(5) *Degrave v. Hedges*, 2 Lord Raymond.—See also 1 Lord Raym. 223 and 235.

where the ship was lost, which occasioned one of those sharp disputes on the validity of stipulations mentioned in the last chapter.

If in such a case the ship returns safely, and the dissentient partner would not contribute to the fitting her out, he gets no share of the profits(6).

It is said by Molloy(7), that if the major part of the owners insist on the voyage, the minor must submit; but then the latter may go into the admiralty, and insist upon the former entering into stipulation for the ship's safe return; and if they neglect to do so, and the ship be lost, they must abide by the loss. By the major part is meant in *value*, not in number.

The account of the voyage, settled by the major part of the part-owners, binds the rest. Part-owners are not answerable but in proportion to their shares.—1 Vent'.

How far some owners may compel the rest to sell is the next consideration; and, according to Molloy, if one owner is so obstinate that his consent to a voyage cannot be had, the law will enforce him to sell his proportion; or, if he will set no price, the voyage goes on: he gets no share of the profit, but must be reimbursed if the ship be lost. And if the major part refuse to set out the vessel to sea, they may not be compelled; but the vessel is to be valued and sold.

(6) Sir L. Jenkins, p. 792. 2d volume.

(7) P. 308 and 310.

But in *Ouston v. Hebden*, 1 Wilson, 101, part-owners being much the minor part in value, though more in number, prayed in the admiralty that the chief part-owner (who insisted on going a voyage against their will) should be obliged to join them in selling the ship, or for such other remedy as the court might think proper, their object being either to make him buy their shares, or else that the ship should be sold, and the money distributed amongst them in proportion. Chief Justice Lee, on a prohibition prayed, held that the admiralty had no power to compel a *sale*, but might compel *security*, for that is a proceeding in rem, not in personam(8); but could not force a party to sell, or to buy the shares of others.

As to the time when a man becomes owner, it has been ruled, that if a ship be sold while at sea, the delivery of the grand bill of sale vests the property, and amounts to a delivery of the ship itself: it is the only delivery which the subject matter is capable of. The bill of sale is the only muniment of the property: by the vendee's taking that, he prevents the vender from defrauding others(9). A person, by being merely in possession of a ship, doth not acquire any credit, for he will be always required to shew how he is owner.

(8) Here it is plainly implied, that the admiralty never can act in personam, unless by consent of the party.

(9) *Atkinson v. Maling*, 2 Term Reports, 64.

The same rules apply to the mortgage of a ship at sea, which is frequently made, universally recognized, and encouraged, for the benefit of trade, and it is not considered like the mortgage of other species of property—from the nature of it no actual delivery of the thing itself can be made at the time of the mortgage, and this is warranted by the common course of trade(10).

A bill of sale of a ship is absolutely, void, unless the certificate of the registry be truly and accurately inserted therein(11).

Ships are rateable to the poor in the parish to which they belong, but the pay of officers in the navy, or in the merchant service, is not(12).

If money be lent on the security of a ship, and possession taken before execution at the suit of another person, the vessel cannot be seized under that execution. It is remarkable, that in the case(13) in which this was determined, the money was lent in England on an English ship, and the possession taken by admiralty process.

#### MASTERS.

The master of a ship doth not, by being constituted master, acquire any property therein,

(10) *Atkinson v. Maling*, 2 Term Reports, 64.

(11) 26 Geo. III. ch. 60. sec. 17.

(12) 4 Term Reports, p. 771. and *Rolleston v. Hibbert*, 3 Term Reports, p. 406.

(13) *Ladbroke v. Cricket*, 2 Term Reports, 649.

either general or special ; he is only considered as an officer, who must render and give an account for the whole charge, when once committed to his care and custody ; and upon failure to render satisfaction ; and, therefore, if misfortunes happen, if they be either through negligence, wilfulness, or ignorance of himself or his mariners, he must be responsible(14).

The master is the agent of the owner of the vessel, and can bind him by his contract, or affect him by his misconduct, and, by the civil law, the ship also ; but he is not the agent of the owners of the cargo, unless so expressly constituted by them(15).

The master of a ship having no property in her, either general or special, cannot, by the common law, empawn the ship ; but by the laws of Oleron, and the admiralty law, if a ship be at sea and takes leak, or otherwise want victuals or other necessities, whereby either herself be in danger, or the voyage be defeated, in such case of necessity the master may empawn for money, or other things, to relieve such extremities, by employing the same to that end(16).

(14) Molloy, vol. I. 322.

(15) 1 Robinson, p. 84 and 85. Cases of insurance form no exception to this rule, for there is an express contract which governs the whole case ; and in revenue cases, positive laws, and the necessary strictness of fiscal regulations, interfere.

(16) Molloy, vol. I. p. 332.

But the master, for any debt of his own, cannot empawn or hypothecate the ship, &c. for the same is no way liable, but in case of necessity, for the relief and completing of the voyage(17); and it follows, *a fortiori*, cannot sell or dispose of the same, without an authority or license from the owners(18).

Though the master has no power, strictly speaking, to sell any part of the ship or cargo, yet it is said that from great necessity, if he cannot hypothecate the lading, he may sell the same, that is, so much as is necessary.

Though the master wants money for the use of the ship before the voyage commences, yet he cannot hypothecate her, nor can he raise money upon her, or her furniture, by the way of a common pawn or mortgage, unless he be part-owner, and then no further than his own part or share in her, by which he may transfer and grant, as a man may do, a fifth or an eighth part in lands or houses.

Though the master of a vessel be also lessee of it, with covenant on their part that he should have the sole management of it, and on his that he should *repair* at his *own cost*, the owners are still liable for necessaries furnished for the ship by order of the master, though without their knowledge, and without their being known to the person who supplied them(19).

(17) Lord Raym. 964.

(18) Ibid. Johnson v. Shippen.

(19) Molloy, p. 335.

Where goods are ordered for a ship by the owners before the appointment of the captain, though some are not delivered till afterwards; yet, as no personal credit is given to the captain, he is not answerable for any of them(20): but where the captain contracts for the goods, though they are furnished for the use of the ship, he is answerable *in respect* of his contract. So that, in such a case, the tradesman hath a claim both on the captain and owners, as well as a specific lien on the ship itself(21).

The powers, duties, and privileges of the master, come next under our consideration; but these and similar questions being complicated and controverted, it is better to consider more minutely and analytically

*How far the contracts or torts of the master affect the owners.*

The question how far the contracts entered into, or the torts committed by the master, bind or affect the owners, seems to have been one very imperfectly resolved by the professors of the common law, whose opinions differ remarkably on the subject. We find it sometimes said, that all the master's contracts and faults extend in their effects

(20) *Rich v. Coe*, Cowper, 635.

(21) 1 Term Reports, p. 108. *Farmer v. Davies*. It is very observable, that in this case it is said, as in *Rich v. Coe*, Lord Mansfield says the tradesman has a specific lien on the ship—why not then sue in the admiralty?

and consequences to their employers; while, at other times, this rule is confined to such contracts only as are for his benefit. On other occasions, we hear that the master cannot bind the owner beyond the value of the ship and cargo, a position which we find to be controverted, perhaps, in the following page.

Not to multiply instances: in a late case(22)—in which the master of a ship taken by the enemy had not only ransomed her for a sum above her value, but had also entered into a collateral pecuniary agreement with one of the crew, by which agreement, in the opinion of the majority of the judges, the owner was bound—the greatest diversity of opinion occurs; two learned judges insisting that the owner may be bound beyond the value of the ship and cargo, while a third positively denies the position: one eminent judge adopting a general rule, that all contracts of the master bind the owners personally(23), and to their full extent, with only two exceptions, which are confined to the value of the ship, viz. the instances of hypothecation and ransom; and another, still more eminent, maintaining, that as he is entrusted with the ship and cargo only, he can-

(22) *Yeats v. Hall*, 1 Term Reports, p. 79.

(23) Roccus, though an eminent civilian and writer on maritime law, lays down the rule in that loose and general way—"Dominus navis," says he, "tenetur ex contractu et delicto magistri navis ab eo præpositi." Notabil. 11<sup>um</sup>. De Navibus.

not make contracts beyond their amount, nor any contract binding the owners, which is not to them beneficial.

With the greatest deference, no one of these contrary propositions seem to me to be strictly true; and the variety of opinion appears to have proceeded from neglecting to recur to those principles of the civil and maritime law, in which, in my apprehension, these questions will find a ready solution.

According to the civil law, no one could be bound by the acts of another, *nemo alterius contractu obligari debet*. But, amongst other exceptions to this general rule, evident necessity introduced one(24) with respect to owners of ships, of whom it was said that *facta nautarum præstare deberent*(25). But they were not answerable for all contracts of the master, nor even for all those which were for their benefit(26), but for such

(24) Cum interdum ignari cujus sint conditionis vel qualitatis, cum magistris propter navigandi necessitatem, contrahamus æquum fuit, eum qui magistrum navi imposuit, teneri. Ut tenetur qui institorem tabernæ vel negotio præposuit. Cum sit major necessitas &c. Nam in navis magistro interdum locus, tempus, non patitur plenius deliberandi consilium.—Pandects, lib. 14. De Exercitoria Actione.

(25) Fourth book of the Digests, tit. q. The restrictions on this rule, as respecting common sailors, will appear hereafter.

(26) Mr Justice Buller, in the case of *Yeats v. Hall*, states instances of possible contracts of the master, which he

only as were made in the progress or within the limits of the business committed to the master's charge, *in illa re, cui præpositus sit magister*, or, to use the words of Judge Buller in the case recently mentioned, within the compass of their employment. But if the contract was made within that compass, and in the execution of the business committed to their charge, though it exceeded the value of the ship and cargo, it bound the owner personally to the full amount covenanted, or as the Roman law termed it, *in solidum*; for whenever a person was liable by that code for the act of another, he was liable for it in its fullest extent; since, as Bynkershoek observes, *qui aliorum facta præstant, ex asse præstare debent*: if the master, therefore, makes a contract in a foreign country, that his owners should purchase an habitation or establish a factory in that country, it could not bind them, for this agreement is quite foreign to his authority and employment; but if he borrowed money for the repairs of the ship, and embezzled or converted it to his own use, the owner, though he thus derived no benefit from the loan(27), or even though it exceeded the

thinks would not bind the owners, though apparently for their benefit; as if a captain of a ship chose to contract with two or three privateers to guard him from an enemy during the voyage.

(27) Si magister ad reficiendam navem mutuatus, nummos ad suos usus converterit, recte ait ofilius, teneri exercitorem, sibi imputaturum, cur talem præposuerit.—

value of the ship and cargo, was responsible for the acts of the fraudulent master appointed by himself(28): and these rules of the civil law, which are to be found in the Pandects *De Exercitoria Actione*, or derived and collected by analogy from what is said in that collection and the code *De Cauponibus, Stabulariis, &c.* have been adopted by the continental maritime nations of Europe (whose great guide is the civil law), and ought, as I conceive, to govern with us(29).

The same principle extends itself to torts. If the captain of a privateer *emissus ad prædandum, perperam prædetur*, if commissioned to cruise against the enemy, he plunders a friend, the owner is responsible. His agent was acting in his province or department, and committed outrage; but if the captain by error, or negligence, or design, with his ship ran down, sunk, or destroyed another vessel, the owner was not answerable (though the captain was), for he did not authorise the captain or master to run down ships; it was not a matter

Bynkershoek, *Quæst. Pub. Jur. cap. 19.* He observes, that such is the Dutch law. I admit that this doctrine is not undisputed.

(28) See some restrictions on this rule in *Roccus*.

(29) *Si ex facto institoris vel magistri tabernæ vel navis dominus teneatur, constat teneri, quanti res sit, nec liberari, si tabernam vel navem dedere (to abandon) parati sint. Eam juris prudentiam nusquam legisse memini, nec etiam rationem habet.*—Bynkershoek, *Q. P. J. cap. 19.*

*ad officium ejus pertinens*(30): and if the owner's ship can in such case be seized, it is only to oblige the captain to give bail, and then the owner may be said to be responsible in a collateral way, as far as the value of the ship and cargo, but no further.

If there are several owners, each of them is responsible for the contract of the master, made in the course of any business, over the conduct of which he was set; but if he is guilty of a tort in matters totally foreign to his authority, then, agreeably to what has been said above, none of them were answerable: and if involuntary damage was done by him in any case, for which they were made responsible by positive law (as in the case of the accidental collision of ships without fault in the crew of either, which subjected them to half the loss as far as the value of the ship and cargo), each was responsible only in proportion to his own share, and all this was agreeable to the Roman law(31).

(30) Bynkershoek, who seems to have much natural humour, says, "*Certe magistri officium non est aliorum naves obruere, nec quisquam sanus huic negotio præpositum dixerit.*"

(31) *Neque in solidum, quando quis sine culpa damnum dedit, actionem esse dandam contra unum ex pluribus dominis navis.*—*Neque id etiam adversatur Juri Romano.*—Bynkershoek, *Qu. Pub. Jur. cap. 20.*

*How far the contracts or torts of the master shall affect the ship.*

It is said by the court, in a case(32) reported by a celebrated judge, that by the maritime law every contract with the master of a ship implies an hypothecation, though by the law of England it is otherwise. I know not where this maritime law is to be found. There is no such rule in the civil law. That law doth expressly and *nominatim* enumerate all the tacit pledges which it acknowledges (33), yet mentions no such one as this. It is said, indeed, that as the repairs of houses at Rome included a tacit pledge, so by analogy we must suppose did those of ships. But Vinnius has refuted this analogy, and agrees with me in opinion, that though the person furnishing money for such repairs was preferred to any other creditor(34), he had not, without express agreement, any qualified or hypothecatory property in the ship, and his remedy was not the *actio hypothecaria*, but the *actio in factum*, not a mortgage suit, but an action on the case. And Roccus, speaking of the modern maritime law, so far from extending this right of tacit pledge by implication to all

(32) In *Justin v. Ballam*, Lord Raymond, p. 805.

(33) In various places, in the 20th, 24th, and 42d of the Pandects, and 8th book of the Code.

(34) See book 20th of the Digests, tit. 4th. *Qui piores in pignore*.

contracts of the master, appears to confine it to mariners wages—to money borrowed to purchase a cargo—to furnish provisions for the sailors—or to pay the rent of a store-house for goods landed—mentioning the lender for ships repairs, or payment of custom duties, as merely having a preference to other creditors(35).

Where a tacit pledge existed, it did not by the Roman law affect a *bona fide* purchaser. Things tacitly pledged might be freely alienated before they were arrested(36); as with us a bond, without a judgment, doth not follow the land in the hands of a *bona fide* purchaser, though its said to be an incumbrance on the land(37).

The torts of the master cannot be supposed to *hypothecate* the ship; nor, in my humble judgment, in strictness of speech, to produce any *lien* on it. How then is the ship forfeited, and lost to the owner, by his captain's misconduct? In my apprehension, only in this collateral way, that it is (agreeably to the practice of the Roman law as to its own citizens, extended by the modern maritime law to foreigners)(38) arrested until he gives bail or *fide jussores*, and sold for defaults and contempts if he will not appear.

(35) Roccus, De Navibus Notab. 91, 92, 93.

(36) See Dig. 20. 2. 9. and Ayliffe's Civil Law, 529.

(37) See 2 Blackstone, ch. 20. and Dr. Christian's note, No. 11.

(38) See Huberus on this practice, and on the province of Friesland, faithful to the old Roman law, refusing it.

We have now done with the effect of the master's contracts, or violence, as to his owners, and proceed to consider how he and they are affected by his negligence. And first, as soon as merchandizes and other commodities be put on board a ship, whether she be riding in a port or haven, or upon the high sea, the master is chargeable therewith; and if the same be lost or purloined, or sustain any damage, hurt, or loss, whether in the haven or port before or upon the seas after she is upon her voyage, whether it be by mariners, or by any other through their permission, the owner of the goods has his election to charge either master or owners, or both at his pleasure—though he can have but one satisfaction—in a court of common law, if the fault be committed *infra corpus comitatus*; in the admiralty if *super altum mare*; and if it be on a place where there is *divisum imperium*, then in one or the other, according to the flux or reflux of the sea. Even accident or force is no excuse; the master must answer, though the loss was occasioned by fire or thieves, or any other accident, the act of God<sup>(39)</sup> or of an enemy only excepted. And if a master shall receive goods at the wharf or key, or shall send his boat for the same, and they happen to be lost, he shall likewise answer both by the marine law and the common law.

(39) Freighters of ships, that is, owners and captains, are not answerable for damage by the act of God, as insurers would be.—Douglas, 264.

This severity of the maritime law requiring some modification, by the act of the 26 G. III. c. 86.(40) it was enacted, "That no owners of any ship shall be subject to make good any loss or damage by reason of any robbery or embezzlement, secreting, or making away with, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize, which shall be shipped on board any ship, or for any act or forfeiture done or occasioned without the knowledge of such owners, further than the value of the ship, with all her appurtenance, and the full amount of the freight due, or to grow due for the voyage wherein such robbery, &c. shall be made, &c. although the master or mariners shall not be concerned in or privy to such robbery, &c."—Sec. 1.

"That no owner of any vessel shall be subject to answer for any loss or damage which may happen to goods shipped on board such ship, by reason of any fire happening on board the said ship."—Sec. 2.

"That no master or owners of any ship shall be subject to answer for any loss or damage which may happen to any gold, silver, diamonds, watches,

(40) It had been before provided, by 7 Geo. II. ch. 15 that owners should not be liable for embezzlement by master, and mariners of goods shipped, nor for any act done by them, without the privity of the owners, beyond the value of the ship and freight. See also this act interpreted to extend to robbery, in *Sutton v. Mitchell*, 1 Term Reports, p. 18.

jewels, or precious stones, put on board such ship, by reason of any robbery, &c. unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master or owners, the true nature, quality, and value of such gold, &c.”—  
Sec. 3.

“That if several freighters or proprietors of any such gold, &c. or other goods, shall suffer any loss or damage by any of the means aforesaid, in the same voyage (fire only excepted), and the value of the ship, with her appurtenances, and the amount of the freight during such voyage shall not be sufficient to make full compensation to all of them, such freighters or proprietors shall receive their satisfaction thereout in average, in proportion to their losses; and in such case it shall be lawful for such freighters or proprietors, or for the owners of such ship, to exhibit a bill in any court of equity for a discovery of the total amount of such losses, and also of the value of such ship, appurtenances and freight, and for an equal distribution and payment thereof amongst such freighters or proprietors, in proportion to their losses, according to equity; but if such bill shall be exhibited by the part-owners of such ship, the plaintiffs shall annex an affidavit to such bill, that they do not collude with any of the defendants, and shall thereby offer to pay the value of such ship, appurtenances, and freight, as such court shall direct; and such court shall thereupon take such

method for ascertaining such value as to them shall seem just, and shall direct the payment thereof in like manner as is now used in such cases of bills of interpleader.”—Sec. 4.

“That nothing in this act should impeach, lessen, or discharge any remedy which any person should have against the master and mariners of such ship, for any embezzlement, &c. or on account of any fraud, abuse, or malversation of such master or mariners; but it should be lawful for every person so injured to pursue such remedy, as he might have done before that act.”—Sec. 5. (41).

#### *The master's duties.*

These are ascertained either by the common marine law, or by act of parliament.

By the common marine law he is to be careful not to break any embargo; and if he does, if any damage accrues, he must be responsible for the same.

By the same law he must not sail in tempestuous weather, nor put forth to sea without having first consulted with his company; nor must he stay in port or harbour, without just cause, when a fair wind invites his departure.

(41) This act, in reality, only enacts the provisions or principles of the old marine laws. See the 41st article of the laws of Wisbuy, and the 13th of the second fragment of the Rhodian laws.

He must not over-charge or lade his ship above the birth-mark, or take into his ship any person of an obscure and unknown condition, without letters of safe conduct.

Nor ought he to lade any of his merchant's goods aboard any of the king's enemies ships (admitting his own vessel leaky or disabled) without letters of safe conduct, otherwise the same may be made prize, and he must answer the damage that follows the action.

Nor shall he come and sneak into the creeks, or other places, when laden homewards, but into the king's great ports (unless he be driven in by tempest), for otherwise he forfeits to the king all the merchandise, and therefore must answer.

Nor ought he to ship any merchandizes, but only at the public ports and keys.

He must not part with the ship's provisions, except to ships in distress at sea, and must buy every thing at the most reasonable rate.

He must not lade any prohibited or unlawful goods, whereby the whole cargo may be in danger of confiscation, or at least subject to seizure or surreption.

He may not set sail without able and sufficient mariners, both for quality and number.

He must not use unlawful colours, nor carry counterfeit coquets or colourable ship's papers.

He must not refuse the payment of the just and ordinary duties, and port-charges and customs. It would be endless to enumerate all the obligations

on him, induced by the revenue laws, in detail.

He must not set sail with insufficient rigging or tackle, or with other or fewer cables than is usual and requisite, respect being had to the burthen of the vessel ; nor in bad weather, nor against the advice of his mariners : and if any damage happens by the delivery of the goods into the lighter, as that the ropes break, and the like, there he must answer ; but if the lighter comes to the wharf or key, and then, in taking up the goods, the rope breaks, the master is excused, and the wharfinger is liable.

If fine goods, or the like, are put into a close lighter, and to be conveyed from the ship to the key, it is usual there, that the master send a competent number of his mariners to look to the merchandize : if then any of the goods are lost and embezzled, the master is responsible, and not the wharfinger ; but if such goods are to be sent aboard a ship, there the wharfinger, at his peril, must take care the same be preserved.

After his arrival at port, he ought to see that the ship be well moored and anchored ; and after reladed, not to depart or to set sail till he hath been cleared ; for if any damage happens by reason of any fault or negligence in him or his mariners, whereby the merchant or the lading receives any damage, he must answer the same.

Even an infant master of a ship is liable to be sued in the admiralty(42); and his responsibility being so great, it is not uncommon to increase his interest in the welfare of the ship by making him a joint partner in the same.

Of the duties imposed upon the master by act of parliament, the first is to deduct out of every seaman's wages sixpence per month, and pay the same to such officers as shall be appointed by the commissioners for executing the office of lord high admiral, to be applied to the support of Greenwich hospital(43). Masters and servants of vessels belonging to the port of London, and employed within the North Foreland in bringing corn, fish, or other provisions, to London, are excused from this hospital duty.

He is to collect or deduct another sixpence per month from every seaman's wages for the support of sick, maimed, and disabled seamen, and of the widows and children of such as shall be killed, slain, or maimed, in the merchants' service.—20 Geo. II. ch. 38.

It is not lawful for any master of a ship bound beyond the seas to carry any mariner, except his apprentices, from the port where he was shipped, to proceed on any voyage beyond the seas, without first coming to an agreement with such ma-

(42) 1 Rolls Ab. 530.

(43) 10 Anne, ch. 17. sec. 2. The method of enforcing payment is in the 4th section. See also 2 George II. ch. 7.

riners for their wages ; which agreement shall be made in writing, declaring what wages each seaman is to have for so long as they shall ship themselves, and also to express in the agreement the voyage for which such seaman was shipped. And if any such master shall carry out any mariner, except his apprentice, upon any voyage beyond the seas, without first entering into such agreement, and he and they signing the same, he shall forfeit five pounds for every such mariner to the use of Greenwich hospital, to be recovered on information, on the oath of one witness before one justice of peace, who is required to issue his warrant to bring before him such master ; and in case he refuses to pay the forfeiture, to grant his warrant to levy it by distress and sale of goods, and if no distress can be found, to commit him to the common gaol till he pay the same(44).

Similar provisions are extended to the coasting trade ; and it is here stated somewhat more particularly, that the agreement shall declare what wages each mariner is to have, and when the same shall be payable, and for what time, or for what voyage the mariner enters ; such agreement to be in force at the time of proceeding to sea. The written agreement is also ordered by a special act(45) in the African trade, and any deviation from the

(44) 2 Geo. II. ch. 36. In Ireland it is 5 Geo. II. ch. 13. Both of them since made perpetual.

(45) 31 Geo. III. ch. 39.

set form forbidden(46); and so it is in the West India trade by an Irish act(47).

His obligation to pay a duty on passing the Eddystone light-house is very well known(48); and the very violent and severe penalties imposed on him in the last century, if he yielded his ship to a Turkish pirate, seem to have been dictated by temporary circumstances now not very material.

He is to take particular care not to receive as a mariner any deserter from his majesty's ships(49).

If he disobeys the signals and orders of convoy, he is punishable with fine and imprisonment by the prize acts.

By 38 Geo. III. ch. 76. to sail without convoy, or to part from convoy, is punishable: as by the old laws of the Hanse Towns(50) if several ships were in company on the same voyage, they were obliged to stay for one another, or be liable to all the damages that might happen to the others by an enemy or by pirates; and in the same manner the penalties for encouraging desertion by our laws, may be compared with the 48th article of the laws of the Hanse Towns, by which the master who debauched a seaman, and hired him after he had hired himself to another master, was to pay twenty-five livres, and the mariner to pay to the

(46) 39 Geo. III. ch. 80.—(47) 38 Geo. III. ch. 48.

(48) 4 and 5 Anne, ch. 20. and 8 Anne, ch. 17.

(49) Anne, ch. 37.—(50) Article 17.

first master, for damages, half the wages the second had promised him.

Among smaller duties—When he arrives with his ship at Gravesend, he is not to be above three days coming from thence to the place of discharge; he is not to receive any gunpowder on board before the ship is over against Blackwall, on pain of five pounds for every fifty pounds weight carried; and he must in the same manner, on coming into the Thames, before he arrives at the same place, put it on shore, or within twenty-four hours after he anchors there, and not keep any gun shot-  
ted, or fire any gun before sun-rising or after sun-setting, between London bridge and Blackwall, under heavy fines: humane provisions, intended (51) to prevent accidents in a frequent population.

If he or any mariner wilfully destroy, or burn, or cast away the ship, it is felony(52).

The master's duties in time of war, or the instances of misconduct he may be guilty of, are as numerous as the rules of the law of nations against which he may offend. It were endless to recount them. One instance may illustrate them, than which none is more frequent, his attempting to break a blockade.

Thus much of the master's duties. Now of his rights and privileges.—That he cannot sue for wages in the admiralty has been repeatedly men-

(51) By a statute of Charles II.

(52) 13 and 14 Charles II. ch. 11.

tioned, together with the reason<sup>1</sup> of this restriction, which extends to his executors. He has a lien on the ship for the freight, and may retain the cargo till the freight is paid(53); but it is said, if he once let it out of his hands, he cannot retake it by admiralty process(54). The ship, by the law of the admiralty, shall answer for the redemption or ransom of the master(55). He may reimburse himself out of the mariners wages for a loss happening by their negligence(56).

By the French ordinances of 1681, no master, patron, pilot, or mariner, is to be arrested for a civil debt, being on board ready to put to sea, except it be for debts contracted for the voyage, as by some acts of parliament seamen in the royal navy cannot be arrested for debts under twenty pounds.

He is not answerable for the contracts of his mariners, unless he recommends them to credit.

The bounties given to him and to mariners in the British fisheries, and on other occasions, are too numerous to be here inserted.

In the Roman State, seamen enjoyed exemption from many public offices and duties; and to build a ship of a certain size, was remunerated with the Jus Quiritium.

In general, however, with us, he must be content to have his good actions remunerated, like every

(53) 2 Eq. Ca. Ab. 96. pl. 1.

(54) See 2 Lord Raym. 934. and 3 Term Rep. p. 323.

(55) 1 L. Raym. 650.—(56) Ibid. p. 22.

other individual member of the state, by the protection of its laws, and the enjoyment of its security.

*MARINERS.*

In what has been said about ships, owners, and masters, in this chapter, I have deviated from the strict line to matters not always or directly cognizable by the admiralty, but the knowledge of which may be incidentally and collaterally useful and requisite to the practitioner in that court. But the present head doth especially come within the province of the instance court; and no suit more frequently engages his attention than that of a mariner's wages. Every person employed in navigating the ship, except the master(57), may sue for his wages here, and any number of them may join in the same suit: and as the refusal of payment generally proceeds upon alleged misconduct or breach of contract on their part, it becomes necessary to consider the duties and obligations, by neglect of which they become liable to the loss of their wages: and these duties shall be viewed, in order of time, as they arise before the commencement, during the period, or at the conclusion of the voyage.

(57) The carpenter and the boatswain may sue here: the mate becoming master pending the voyage, may sue for his previous wages, or as mate through the whole time.

The master's duty, as prescribed by acts of parliament, of entering into written articles with them, has been above stated; they on their part are bound to sign the said articles of agreement, in case of a voyage to parts beyond the seas, within three days after they have entered themselves, and in case of voyages coastways at the time of entering; and this agreement, when it is signed, is binding and conclusive(58) upon all parties during the time contracted for.

If any seaman shall desert, or refuse to proceed on the voyage, after he shall have signed such contract, he shall forfeit to the owners of such ship the wages due to him at the time of his deserting, or refusing to proceed on the voyage (59).

If any such seaman shall desert or absent himself from such ship, after he hath signed such contract, upon application made to any justice of peace by the master, or other person having charge

(58) As to its being perfectly conclusive, see the case of the *Isabella* in the instance court, 2 Robinson, p. 241.

(59) The sailor was allowed by the Consolato del Mare, though he had signed the contract, or verbally agreed by taking the master's hand which was equivalent, to excuse himself before the voyage began, for the three following reasons, which will appear to us somewhat ludicrous: *Per pigliár moglie, per andár in pellegrinaggio, or per aver fatto voto, innánzi, che ti accordasse*. If he wanted to take a wife, to go on a pilgrimage, or to perform a vow made previously to his contract.

of the ship, it shall be lawful for such justice to issue his warrant to apprehend such seaman; and if he shall refuse to proceed on the voyage, and shall not give a sufficient reason for such refusal, to the satisfaction of the justice, to commit him to the house of correction, to be kept to hard labour, not exceeding thirty days, nor less than fourteen.

The agreement for wages, though directed by the acts of parliament above mentioned to be in writing, is not to be under seal; and if it be under seal, or in any manner special, the jurisdiction of the admiralty is ousted.

When the seamen have signed the articles, they are to appear at the place and on the day appointed, to take on board the provisions, to rig out the ship, and set sail(60).

The contract for wages may be either by the voyage, by the month, or other stated period; by the run from port to port; or by the freight, *i. e.* to have a certain proportion of the freight earned: and in all cases, where it shall be necessary that the agreement should be produced in court or elsewhere, no obligation shall lie on any

(60) Suppose the owners, after the articles signed, chuse to alter the voyage or destination before the ship sails; the *Consolato* provides for this case by analogy; for what is said in cap. 147, "*Si padrone piglia altro viaggio,*" though spoken of a subsequent time, equally applies in principle to the commencement of the voyage, and releases the mariners. *Pigliare*, in this work constantly means *prendre*.

mariner to produce the same, but such obligation shall lie on the master or owners; and no mariner shall fail in any suit for want of such agreement being produced; and no mariner, by entering into such contract, shall be deprived of any means for the recovery of wages against any ship, or the masters or owners, which he may now make use of.

We have seen that the master's apprentices are excepted in the act requiring the execution of a written agreement. Voluminous regulations are made concerning these apprentices in other acts of parliament, too long to be here recited(61).

By the laws of Wisbuy and the Hanse Towns, a master may turn off a mariner, without any lawful cause given, before he sets sail; paying him by the former laws half, by the latter one-third, of what he had promised him for the voyage. But this, I conceive, cannot apply to the case of articles signed, after the time agreed upon has commenced, as the sailor might so, without any fault, lose other opportunities of profitable hiring.

By the laws of the Hanse Towns, no master was allowed to hire a mariner before he had seen his pass or certificate of his faithful behaviour in the service of his last master(62), on pain of forfeiting one hundred sols, unless he was necessitated

(61) Particularly 2 and 3 of Anne, ch. 6.

(62) "It is not usual to be minute in the enquiry made into sailors characters," saith the court, speaking of Britain, 2 Robinson, p. 262.

in a strange country; and masters were obliged to give mariners certificates of their faithful service, and if they refused or delayed, were to forfeit one hundred sols(63). And by an act of parliament, with us no seaman shall leave the ship without a discharge, on pain of one month's pay.—2 Geo. II.

Cases of peculiar hardship have occurred where seamen, instead of signing the usual articles, have formed special agreements for themselves, which at the time they thought advantageous. Such was that of *Cutter v. Powel*(64), where a sailor hired for a voyage took a promissory note from his employer for a certain sum, much larger than the ordinary wages payable, provided he proceeded, continued, and did his duty on board for the voyage, and before the arrival of the ship he died: it was ruled, that the meaning of his contract was to receive the larger sum if the whole duty were performed, and otherwise nothing; and that it was a kind of insurance; that his administratrix could not recover on the contract; and there being an express contract, could not have recourse to an implied one, or a quantum meruit. The special nature of the agreement, I suppose, excluded an admiralty suit(65).

(63) Articles 18 and 19.—(64) 6 Term Rep. p. 320.

(65) Quere, whether justly, if such was an usual agreement in West India voyage?—It is said in that case, that the doctrine of courts will submit to the settled usage of the trading world.

The voyage being commenced, and the ship having sailed, the mariners are to pay due obedience to the master, who hath the supreme rule on ship-board, and whose power and authority are by the law much countenanced; and this is but reasonable, as it is of the utmost consequence to preserve peace and order and good discipline when upon that dangerous element; and also as he is in many cases answerable for the actions of his mariners, whom he is supposed to appoint and to entrust.

A master of a ship may give moderate and due correction to his mariners, and if they bring an action against him, he may justify the same at common law(66); and by the laws of Oleron if a mariner shall assault the master, he is to pay five sols, or lose his hand(67); and by the law of Wisbuy, half his hand in a cruel manner.

A great judge(68), some years since, is said to have made some determination on this subject unfavourable to the power of correction of the master, and that this determination, ill understood, occasioned much mischief in the sea service, and was even the cause of that disorder

(66) Molloy, p. 358.

(67) I know not any express penalty with us. He may of course be discharged and lose his wages, and be prosecuted for an assault; and that in the admiralty, if the striking was on the high sea. See, however, the 25th article of *Roughton*, which very much agrees with the *Consolato*.

(68) Lord Loughborough.

among the seamen, which occasioned the loss of the Halsewell East Indiaman in 1786. Having never seen any note of this determination, I am not enabled to say precisely to what extent it went.

The laws of Oleron restrain the correction of the master to one blow(69); and the Consolato del Mare(70), adopts this rule of moderation in these words: "The mariner is obliged to obey "his master, though he should call him ill names, "and is enraged against him. He ought so to "keep out of his sight, or hide himself in the "prow of the ship; if the master follows him, "he ought to fly to some other place from him; "and if he still follows him, then the mariner may "stand upon his defence, demanding witnesses "how he was pursued by the master; for the master ought not to pass into the prow after him."

If a mariner shall commit a fault, and the master shall lift up the towel(71) three times before any mariner, and he shall not submit, the master, at the next place of land, may discharge him; and if he refuses to go ashore, he shall lose

(69) Article the 12th.

(70) Chap. 16.

(71) I have taken these words from Molloy, Book II. ch. 3. sec. 2. but I suspect that he has here made a very ridiculous mistake. What is the towel, unless he means the appellation sometimes given by the vulgar to an oaken stick. He cites the laws of Oleron, but their words are *oster la touaille*, to deny him his mess.

half his wages, and all his goods within the ship. If the mariner shall submit, and the master will not receive the same, he shall have his whole wages; or if the mariner shall depart the ship on the master's command, and the master happens not to take another, and any damage ensues, the master must answer.

These rules do not, in my conception, strictly affect the British service. The master is to preserve discipline generally. If guilty of cruelty, or unreasonable severity, he will be restrained and punished.

The offences particularly specified by the marine law, which subject the mariner to punishment, or loss of his wages<sup>(72)</sup>, in the whole or in part, are drunkenness, theft, quarrelling and desertion. For greater crimes, such as murder, he not only forfeits his wages, but the master is bound to seize him, and keep him in safe custody till he arrives at his port, and then deliver him to justice to be punished. And even without crime the mariner may lose his wages, on proof of his utter incapacity from want of skill, &c. to discharge the duty which he undertook, and for which he was to receive wages.

We begin with the most frequent offence desertion. Desertion during the voyage is punished

(72) If sailors do not perform their duty, they lose their wages, 6 Term Reports, p. 323; and see the Statute 13 Car. II. Stat. I. Cap. 9.

both by the common marine law, and by acts of parliament. What shall be construed desertion is specially ascertained for the most part in the seamen's articles, the form of which, in some cases, for instance in the West India trade, is fixed by act of parliament, and generally an absence of forty-eight hours without leave, and sometimes of twenty-four, is construed to be desertion, *il stesso giorno debba esscre ritornato*, says the Consolato del Mare, cap. 151.

The Consolato del Mare excuses the mariner for leaving the ship, if on these three accounts; *essere patrono di nave, piloto, per conventione, & si muore il patrone*, to become captain or pilot of another vessel, or if allowed by special agreement, or when his captain dies. The last is a reason most unintelligible, for though his pact be supposed to be only with the captain, it is to stay by the vessel; he was also discharged from his obligation if the master wanted to force him into any dangerous place, as where the plague was; or if the ship was sold to another owner. See cap. 144. *marinaro non e tenuto*, &c. and cap. 148. *Quando li nave si vendera*, &c.

By the 20th article of the laws of Oleron, two sailors at a time in a foreign port may go ashore, if the ship be safely moored, but they must return in such season that the master may not lose the tide.

By the 4th article of the laws of Wisbuy, no mariner is to stay a night on shore without the

master's leave, nor unmoor the ship's boat in the night, on pain of forfeiting two deniers; and by the 17th, he pays any damage that ensues. *A marinaro che non dorme in nave non e tenuto il padrone dar da mangiare.* Consol. del Mare, cap. 143.

By the 22d article of the laws of the Hanse Towns, no seaman may go ashore without the consent of the master, pilot, mate, or clerk of the ship, under penalty of 25 sols for each time; and by the 40th article of the same, if any seaman goes ashore without leave, and the ship suffers for want of hands, he shall be kept in prison on bread and water for one year, and corporally punished if any seaman loses his life for want of his assistance.

But it is said in the 17th article of the laws of Wisbuy, that if the ship be moored with four cables; and in the 33d of the Hanse Towns, if she be safely anchored; the sailors may go ashore one after another, or two at a time, for a short and reasonable space of time.

By the French ordinances, 1681, seamen going ashore without leave, for the first fault forfeit five livres, and for the second, are to be corporally punished. I do not find that the English laws have imposed specific fines for absence, but the court of admiralty can deduct from the wages for this and other offences at its discretion, pro rata of the damage(73).

(73) Sir L. Jenkins, vol. 1. p. 83. thus, he observes, a court of law could not do.

Desertion is thus punished by statute 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. If any seaman deserts, or refuses to proceed when beyond seas, he forfeits all his wages.

A previous Statute, 11 and 12 of William III. c. 7. has words more general. All officers or sailors who shall desert the ships wherein they are hired to serve for that voyage, shall forfeit their wages, without saying *beyond the seas*. A command as general as that in the 163d chapter of the Consolato, viz. *senza expressa licentia del piloto, o del Scrivano, quando non ci e il patrono, il marinaro non puo discendere in terra*, in chap. 171; where he also is forbidden to sleep on shore without leave.

By 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. it is enacted, "That if any seaman shall absent himself from the vessel to which he belongs, without leave of the master or other chief officer having charge of such ship, he shall, for every days absence, forfeit two days pay to the use of Greenwich Hospital(74)."—Sec. 5.

"That if any seaman, not entering into the service of his majesty, shall leave the vessel to which he belongs before he shall have a discharge in writing from the master, or other person having the

(74) Forty-eight hours is a complete desertion. This clause, therefore, must suppose the captain to forgive the desertion, the sailor paying the penalty.

charge of such vessel, he shall forfeit one month's pay."—Sec. 6.

"That the masters or owners of ships shall have power to deduct out of the wages of any seaman, all penalties incurred by this act, and to enter them in a book, and to make oath, if required, to the truth thereof; which book shall be signed by the master and two principal officers belonging to such ship, setting forth that the penalties contained in such book, are the whole penalties stopped from any seaman during the voyage; which penalties (except the forfeitures of wages to the owners, on the desertion of any seaman, or on refusing to proceed on the voyage) shall go to the use of Greenwich Hospital, to be paid and accounted for by the masters of ships coming from beyond the seas, to the same officer at any port who collects the six-pence per month, which officer shall have power to administer an oath to every master touching the truth of such penalties."—Sec. 9.

"That if any masters or owners of ships shall deduct out of the wages of any seaman, any of the penalties by the act directed to the use of Greenwich Hospital, and shall not pay the money to some officer who collects the six-pence per month in the port where the deduction shall be made, within three months after such deduction, they shall forfeit treble the value to the use of the Hospital; which, together with the use of the money deducted, shall be recovered by the same

means as the penalties for not duly paying the six-pence per month.”—Sec. 10.

“And that nothing in the act should debar any seaman from entering into the service of his majesty; nor shall such seaman, for such entry, forfeit the wages due to him during his service in such merchant ship; nor shall such entry be deemed a desertion.”—Sec. 13.

“But the temptation to desert in the West Indies, from the high wages there given to mariners, having occasioned much mischief and inconvenience, it became necessary to make a particular act on the subject; and therefore it was enacted, by 37 Geo. III. ch. 73(75), that no seaman, or other, who deserts at any time during the voyage out or home, from any merchant ship trading between the West Indian colonies and Great Britain, barred (beside other penalties) from suing for any wages earned during the voyage, from master or owner of a ship on board of which he shall enter immediately after such desertion.”

“The master of a merchant ship, bound hither from said plantations, who knowingly hires a deserter from another vessel, forfeits one hundred pounds.”

“No master of a merchant ship, sailing from Great Britain, after the time in the act men-

(75) There is a correspondent act in Ireland which is there, 38 Geo. III. ch. 48. The forfeitures in Ireland are to the Marine School.

tioned, shall hire any one in said colonies, &c. to serve on board her, on her voyage back, at a higher rate than double the monthly wages contracted for with persons in same station, at last leaving Great Britain, unless governor, chief magistrate, collector, or comptroller at such place, direct more to be given under his hand; and all contracts and securities to the contrary are void; and master or other, engaging or procuring, or paying, &c. forfeit one hundred pounds."—ib. Sec. 3.

"The master of every such ship is to deliver on oath to collector or comptroller, in ten days after his arrival, out and home, exact lists of the crew on board at leaving Great Britain, and on arrival at plantations, and of all who died during the voyage, and of the wages due at time of death, penalty fifty pounds."

"No person who shall, in said colonies, &c. engage himself, &c. or enter on board any merchant ship that shall sail from Great Britain after the time in the act mentioned, shall be entitled to, or sue for, recover or receive any higher wages, or other gratuity or advantage than as above."—ib. Sec. 5.

"All wages due to any person engaged on board any merchant ship, for any voyage from Great Britain to said colonies, who dies on board during the voyage, shall, in three calendar months after her arrival here, be paid to the receiver of the six-pence duty, for Greenwich Hospital, for the

use of the executors, &c. of deceased on penalty of fifty pounds, and double the amount."

"The act is not to extend to persons hired for the voyage home, who at hiring produce certificate as therein of discharge from last vessel (which master shall give in three days after demand, penalty twenty pounds) nor to cases of necessity, hazardous service, or extra duty, proved before chief officer, or a justice of peace in said plantations, provided the party did not desert from his last ship," &c.—Ib. Sec. 9.

"From the time in the act mentioned, the articles to be entered into between the masters, seamen, and mariners of such merchant ships, must be agreeable to a form therein prescribed." —Ib. Sec. 01.

To prevent desertions, by an act long antecedent to this, masters and owners of merchantmen are forbidden to pay to any seamen beyond the seas, any money or effects on account of wages, exceeding one moiety of the wages due at the time of such payment, until the ship's return to Great Britain, Ireland, or the Plantations, on pain of forfeiting double the money so paid(76).

The next fault to be considered is contention and quarrelling and fighting, for which, by the laws of Oleron(77), the sailors may be turned

(76) By 8 Geo. I. ch. 24. made perpetual by 2 Geo. II. ch. 28.

(77) Article 6.

out of the ship ; and if any of them be wounded, the master is not obliged to get them cured, nor in any thing to provide for them. Fighting and giving the lie on board was also punished with pecuniary mulcts by the laws of Oleron and of Wisbuy(78).

If one mariner kills another, or commits any crime too atrocious to be punished adequately by the master's power, the master is bound to seize him, and keep him in safe custody till he arrives in port, and then deliver him up to justice to be punished(79.)

A master may at any time turn away a mariner that rebels, or is unfaithful to him(80).

By the Consolato del Mare, cap. 151 ; the mariner was even to be sworn to pay obedience to the master, *è obligato anche di giurare, essere fedele di patrone* ; and by the 159th chapter, he is obliged to obey his captain in every thing, except entering into the service of another ship.

As to other excesses, by all the marine laws, drunkenness is corporally punished. By the French ordinances of 1681, by ducking, and putting in confinement. If it produces neglect of duty, I do not see why it should not be punished with loss of wages.

(78) 12 Article of the former, 24 of the latter.

(79) Wisbuy, Article 30.

(80) Ibid. 29.

By the laws of the Hanse Towns (81), seamen might not feast and carouse in the ship without the master's leave, on pain of losing half their wages; and no seaman might let his wife lie on board, under penalty of fifty sols.

Theft, committed by a mariner, by the laws of Oleron, was most severely punished. He was to be grievously tortured, and to make restitution to the owner. If the master was an accomplice, he was to make good double to the owners, and the mariner to receive a hundred blows of a cudgel. If the master was not conusant of it, still by all maritime laws he was answerable, for he was supposed to have been acquainted with the character of his sailors. By the laws of Wisbuy(82), the seamen were to keep and watch the merchandize, and if they ran away with any thing specially entrusted to them by the master, it being proved by two witnesses, they might be executed, and that as it should seem by summary process on board the ship(83); a power in our free constitution very properly refused to any but the regular tribunals.

By the laws of the Hanse Towns, if master or mariner kept back any merchandize taken on

(81) Articles 31 and 32.

(82) Articles 47 and 61.

(83) The old maritime laws were extremely arbitrary as to these summary processes on board; thus, if the ignorance of the pilot occasioned damage, they might cut off his head.

freight, unless in case of necessity, they were to be apprehended and punished as robbers.

Beawes, in his *Lex Mercatoria*, observes, that barratry(84) of seamen is an epidemical disease. This word means cheating the owners. By the general maritime law, if goods delivered on ship-board are embezzled all the mariners ought to contribute to the satisfaction of the party who lost his goods; and the cause is to be tried in the admiralty. Fraud in losing a ship has been determined to be barratry, but negligence is not. The special acts of parliament relative to marine embezzlements, have already been stated under the duty of the master.

The *Consolato del Mare* punishes theft in the sailor with loss of his wages, and what goods he may have on board, with power to the master also to imprison him, until he can be delivered up into the hands of justice(85).

By other acts of parliament, commonly called the acts of customs, seamen concerned in landing goods at improper places and times, are subject to severe penalties. And here it may be proper to mention, not as a penalty, but as a disability, that a sailor cannot insure his wages, or any thing

(84) He spells it *Barretry*, a word of very different import, which signifies stirring up suits and quarrels.

(85) Cap. 164. "*Marinaro, che rubera robba, o esarcia, "o mercantia che fusse nella nave, debbe perdere il suo "salario, & la robba," &c. &c.*

that he is to receive at the end of the voyage in lieu thereof ; nor can he recover the value of such thing in an action against his agent for negligence, in not procuring such insurance(86).

By the French ordinances of 1681, mariners are forbidden to take any bread, or draw any drink, without permission of the master or steward, under pain of the loss of one month's wages, and a greater punishment if deserved ; and if they destroy the bread, spoil the drink, make the ship leaky, excite sedition to break the voyage, or strike the master, having arms in his hand, are to be punished with death ; and sailors sleeping on the watch, are to be put in irons for fifteen days.

By the laws of Wisbuy, if the master discover that a mariner is infected with any contagious distemper, he might put him on shore on the first land he makes, without being bound to pay him any wages, if two or three mariners attest the fact.

Cowardice, and desertion of their duty in fight, are also criminal even in the crew of a merchant ship.

By the laws of the Hanse Towns, if they do not defend the ship against rovers, they lose their wages. If they refuse to assist, they are to be whipped as cowards and rascals ; and if the mariners are brave, but the master cowardly, he is

to be turned out of the ship with infamy. And other marine laws agree in these general ordinances.

As wages may be lost or forfeited by the offences of the mariners, so they may also by misfortunes happening to the ship; a rule seemingly of much severity, but wisely adopted to augment the care and anxiety of the seamen about the safety of the ship, and also founded on the principle, that freight is the mother of wages; and the freight being lost, out of which they were to arise, they perish with it.

The Rhodian laws ordain, that if by the *negligence* of master and mariners any damage or shipwreck happen, they shall be answerable for it.—  
Part II. article 10.

The same rule is extended by implication to loss by *misfortune* by the third article of the laws of Oleron(87), which says, that if any vessel,

(87) Mariners wages are not payable if a ship be lost or taken before the end of a voyage, *Hernaman v. Bawden*, 3 Burrow, 1845; and in that particular case the voyage, though to Newfoundland, and thence to Spain or some port in the Mediterranean, was holden one entire voyage. This case may appear to contradict the old decision in *Edwards v. Child*, 2 Vern. 727, (where the mariners had given bonds to the East India company not to demand their wages, unless the ship returned to the port of London; yet it was ruled, that as the ship had sailed to India, and there delivered her outward-bound cargo, the mariners were entitled to their wages on the outward-bound voyage, though

through misfortune, happens to be cast away, in whatsoever place it be, the mariners shall be obliged to use their best endeavours for saving as much of the ship and lading as possibly they can; and if they preserve part thereof, the master shall allow them a reasonable consideration to carry them home to their own country.

The sense of the last recited passage from the laws of Oleron evidently implies, that their wages are totally lost by the loss of the ship, except as far as goods are saved, and the money given to carry them home is a reward, and not part of their wages; and this is proved by the fifteenth article of the laws of Wisbuy, which says the mariners are obliged, to the utmost of their power, to save and preserve the merchandize, and for doing it, ought to be paid their wages, and not otherwise; and the same language is repeated in the forty-fourth article of the laws of the Hanse Towns.

By an ordinance of Philip II. of Spain, in the year 1563, it is ordained, that seamen shall be bound to save as much as they can from shipwreck; and in such case the master is bound to pay them their wages(88), and to give them a

the ship was taken on her return to England.) But there is no real contradiction, for in the former case, the vessel went to Newfoundland in ballast, and there loaded with fish, so that the first port of delivery was to be in Spain.

(88) Quere. Doth it mean their whole wages, or only pro rata of the goods saved?

further reward for their labour out of the goods; but if the seamen refuse to do their endeavour to save the goods, they shall have neither pay nor reward.

By the ordinances of the French marine, in case a ship be taken, or suffer shipwreck, and ship and goods be *entirely* lost, the seamen shall pretend to no wages; but they shall not, however, be obliged to restore what has been advanced to them(89).

In England it has been settled, that if a ship do not return, but perishes by tempest, enemy, fire, &c. before she completes her voyage, the mariners shall lose their wages; for if the mariners shall have their wages in these cases, they will not use their best endeavours, nor hazard their lives, to preserve the ship(90). It is said, however, that if the ship be previously unladed, they shall get their wages(91), which must proceed on the principle of the freight having been earned.

This rule is recognized in many late cases, and particularly in *Abernethy v. Langdale*(92), where

In 1784, in the case of the Warren East Indiaman, opinions were given, that the owners having insured the freight, made no difference as to the sailor's demand.

(89) See marine laws of France established by Lewis XIV. in 1681.

(90) 1 Siderfin, 179. and 2 Lord Raym. 1212.

(91) Keble, 831.

(92) Douglas, p. 520.

a ship having been taken before she completed her voyage, Lord Mansfield said, that an officer or sailor(93) suing for his wages, in that case, was entitled to nothing; for that freight is the mother of wages, and the safety of the ship the mother of freight(94). But if she arrives at a port of delivery, wages are payable to the day of arrival, and for half the time of unloading.

Since the whole wages are not payable before the voyage ended or completed, contests will naturally arise on the question, whether the voyage has been completed or no? This must depend on the special words of the contract; and all that can generally be observed is, that the unloading the ship, or coming to one or more ports of delivery, doth not necessarily conclude the voyage, much less a partial unloading; as, in the former case, the seamen may still be wanting to conduct the ship home in ballast; and in the latter, it cannot be perfectly known whether the sailor has been guilty of embezzlement or waste, till the ship is totally discharged of her cargo.

(93) As to suits for wages, they are on the same footing,  
1 Lord Raym. 397. 632.

(94) The vessel in that case had two characters, one as a privateer, the other as a merchantman. Considering her in the latter capacity, the plaintiff failed for the reasons above mentioned; and viewing her in the former, he was held not to be entitled to any wages, though he was sent from the ship before the capture, as prize-master, on board a prize taken in the course of the voyage.

By many of the old sea laws, which have been copied on this point by an act of the American States, the sailor is entitled to one-third part of his wages at the first port of delivery; but I have heard strong evidence that no such rule prevails in Britain.

By the laws of the Hanse Towns, the sailor was entitled to one-third of his wages when he set sail on the voyage, one-third at the port of discharge, and the other third when the ship returned home; and by the laws of Oleron, the master might lawfully retain part of his wages after the vessel was unladen, until the ship was brought back to the port from whence she came, unless he gave good security to serve out the whole voyage; and, in fact, in British ships the sailor always gets part of his wages to fit him out, and more on the voyage; though he has no strict right, I believe, to demand any until the ship comes back in ballast, or otherwise, to the port from whence she came; and the laws of Wisbuy seem to agree with ours. See article 31. And by the French ordinances of 1681, which Sir Wm. Scott justly calls *celebrated ordinances*(95), a seaman hired for a voyage must not leave the ship without a discharge in writing, till the voyage is ended, and the ship-moored at the key and unladed(96).

If seamen bargain for a certain proportion of the ship's freight, instead of wages in money, in

(95) In his judgment on the Swedish convoy.

(96) Section 22.

case freight is not to be had for her, when she arrives at the port for which she was bound, and she must go farther in quest of it, the seamen must go with her(97).

If a ship is stopped in a strange country, or the mariners be forced to stop there for their freight, they shall all that time be maintained as usual, but are not to demand extraordinary wages; and if any seaman leave the ship on account of her stay, he shall be corporally punished(98). If the ship be forced to winter in a strange country, they are not to get extraordinary wages; and if they endeavour to do so, are to forfeit half what they would have had(99).

A curious question was started in a modern(100) or recent case, which arose before the power of ransoming was taken away by the act of parliament, 22 Geo. III. ch. 25, viz. Whether if a ship were ransomed, and proceeded on her voyage, the sailors would be entitled to their wages, and the owners bound to pay them? Mr. Justice Buller held, that they would not be so entitled. "The ransom," said he, "is a new purchase of the ship, and it will "deserve great consideration before it is determined, that after a ransom the owners shall be "liable to pay wages for the time which elapsed

(97) Wisbuy, 32.

(98) Hanse Towns, article 49.

(99) Ibid. 22.

(100) Yates v. Hall, 1 Term Reports, 797.

“before the capture: no authority has been cited  
“to support that position, and *the general rule*  
“*of law is, that if the ship be captured, the wages*  
“*are lost.* If the sailors be entitled to wages for  
“the *remainder* of the voyage (which has not yet  
“been determined), that right must be founded  
“purely on equity; and then to bind the owners  
“personally, it would be incumbent to shew that  
“the owners had accepted the ship; for if they  
“abandon her, the ship, as far as they are con-  
“cerned, is to be considered as if not ransomed  
“at all.”

This power of ransoming being done away by  
22 Geo. III. ch. 25. such question cannot now  
occur, unless that act should be repealed.

Though it is laid down in such general terms,  
that by the loss of the ship all the wages are lost,  
this rule, as I conceive, only applies in this  
extent to cases of total loss; for if part of the  
cargo be saved, and the sailors have used their  
utmost exertions to save it, they ought to be paid  
in proportion to the value of the freight of the  
goods saved.

Thus the old law of the French marine or-  
dains, that if some part of the ship be preserved,  
the seamen shall be paid the wages that are due to  
them out of the wreck they have preserved; and  
if there be only goods saved, the seamen, even  
those that are engaged by the freight, shall be  
paid their wages by the master proportionably to  
the freight he receives; and whatever way they

be hired, they shall be over and above paid for the time they are employed in saving the wreck and goods. The same rules are adopted in almost all marine codes, and, as I conceive, furnish an excellent guide to us(101).

The demerits of the seamen *during* a voyage, and their consequent effects, have been considered. I proceed to review the privileges to which the well-deserving sailor is entitled.

If he is dismissed by the master during the voyage without sufficient cause, he is bound to pay him his whole wages, and defray the charges of his return. But if a ship is forced to winter in a strange country, by the laws of the Hanse Towns, sailors get no *extra* wages.

If the master deviates from the voyage contracted for, he ought to have the consent of his mariners, or pay them what the major part shall adjudge to be due for the change, by the laws of the Hanse Towns, article 24.

By the Wisbuy laws, the mariner, though dismissed by the master for cause, if he compensates for his fault, and the master will not receive him, is to have his whole wages.

(101) The French marine code, formed in Louis the Fourteenth's reign, from which the above is quoted, was systematical and excellent. The French of this day, who delight in annulling every thing constituted in former days without distinction, have departed from it. It is surprising that we have not a more regular and detailed marine code of our own.

If by shipwreck, capture, or other accident, sailors are left abroad, they are to be subsisted at ninepence per day by the governors, ministers, or consuls, and sent home as soon as may be, by 32 George III. ch. 33.

If the master of a merchant ship, during his being abroad, force any man on shore, or wilfully leave him behind in the plantations or elsewhere, or refuse to bring home all the men he carried out, if able to return, he is to suffer three months imprisonment, by 11 and 12 William III. ch. 7.

If a ship be seized for debt, or for having contraband goods on board, it has been held that the sailors have a right to their wages up to the time of seizure; because, though the voyage was never completed, that was owing to the act of the owner, and not to any negligence of the crew(102).

If a sailor becomes sick during the voyage, and is left on shore, he is by the laws of Oleron entitled to his whole wages, after deducting what has been laid out for him; and in conformity with this rule, in a late case at law, the jury gave a verdict for the whole wages to a sailor who had been put on shore for a broken leg, and the court refused to grant a new trial(103)

(102) See Langdale and Abernethy in Douglas, and Viner's Ab. tit. Mariners.

(103) Chandler v. Greaves, 6 Term Rep. 325.

The laws of Oleron(104) were particularly humane upon this subject, for they direct the master to furnish the sick sailor put on shore with lodging and candlelight, and also to spare him one of the ship's boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship for men in health; and provide, that if he dies, his wages unpaid shall go to the next of kin.

The laws of Wisbuy and of the Hanse Towns agree upon this subject with the laws of Oleron; but the ordinances of Charles V. give to the next of kin but half the wages, if the death was on the outward-bound voyage; and the Spaniards in the West Indies had a hard custom of giving no wages to the sick, unless they got substitutes.

If a mariner be impressed, he doth not lose his wages(105). And here it may be useful to mention in what cases naval persons (though not enjoying any special protection, such as the watermen on the Thames, are generally reputed to have) are by statute exempted from being impressed; and this is where they are of the age of fifty-five, and under eighteen, and for the first two years of their going to sea; and if they are foreigners, serving in any of our merchantmen or privateers; and every person who, not having before used the

(104) Article 7.

(105) *Wiggins v. Ingleton*, 2 Lord Raymond, 1211, said by Lord Holt.

sea, shall bind himself apprentice to the sea, for three years after he so binds himself; and to all the persons above described the lords commissioners of the admiralty are to grant protections(106).

If a seaman is wounded in the ship's service, he ought to be cured at the expense of the ship; but if he is wounded in riots and quarrels, he must pay his own charges, by all the old maritime laws.

By a celebrated act of the 20th George II. a corporate company was established for the relief and support of sick, maimed, and disabled seamen—and of the widows and children of such as shall be killed, slain, or drowned in the merchants' service; and long before, by an act 13 and 14 Chas. II. ch. 11. officers and seamen wounded in defending an English ship, on petition to the court of admiralty where the ship shall arrive, shall have such sum of money as the court shall judge reasonable, to be raised upon the owners.

By a peculiar privilege, seamen and mariners are also entitled to dispose of their wages and personal effects, as before the statute of frauds (107).

The provisions of the Consolato del Mare, as to seamen deceased, are extremely worthy of observation: they are contained in the 125th chap-

(106) 13 Geo. II. ch. 17.

(107) In England, by 29 Chas. II. ch. 3. In Ireland, by statute 7 Wm. III. ch. 12.

ter.—“*Se Marinaro che sara amalato, & morira  
“nella nave, debba essere pagato di tutto il suo  
“salario, & se ci fusse alcuno parente suo, a quello  
“sieno date le cose di colui, e se quello che morte  
“sara, havesse detto, o non havesse detto, si a dato  
“alle figliuoli o alla mogliera, se con lui stava quando  
“il marito era vivo, e se la mogliera non fusse leale,  
“o non stessee con lui quando si parti della patria,  
“o che fusse fugita, il patrone della nave & scri-  
“vano, con licencia della corte alli parenti piu strétti  
“lo debba dare(108).”*

We come now to the termination of the voyage, which, as we have seen, is not completed by the unlading of the cargo, or coming to a port of delivery (unless there be some special agreement to that purpose) but by arriving at the port from whence she set out, if the contract was for the whole voyage and not by the run or freight, first premising that at the unlading port or port of discharge, the sailor is not to be wantonly delayed, but the ship ought to be unladen with all possible dispatch(109).

(108) “If a mariner die on board, all his wages must be paid; and if he had any relation on board, to him his effects are to be delivered; and, whether the deceased ordered it or not, are to be sent to his children and to his wife, and if she lived with him in his life-time; but if his wife was not loyal to him, or refused to cohabit with him when or before he left home, or had eloped, the master or clerk of the ship, with consent of the court, was to take care to have his effects given to his nearest relations.”

(109) Wisbuy, article 52.

Still, when she does arrive at her original port, controversies perpetually arise as to the remaining duty of the sailors, and the exact time when they are entitled to their discharge, sailors often pretending that, after unloading the cargo into lighters, perhaps miles below the quay, their duty is at an end. It is necessary, therefore, that they should know, that by the sea laws it is forbidden to any mariner to go out of the ship and leave it, after the voyage is done and the ship discharged, until her sails are all in, her furniture taken away, and she is sufficiently lightened of her ballast(110); by which I understand sufficiently lightened to bring her up to the quay, or custom-house, because the captain certainly has a right, if the water be too shallow to allow the vessel to sail up, to put the cargo in hoys, lighters, or barges; and yet it would be absurd, in my humble judgment, to say he must hire another crew merely to bring his vessel up the river, and to take down the rigging. Certainly, in such a case, the sailors are not to be delayed, by losing an unnecessary moment in unloading into the barges; but the delay, as it should seem, could not be of more than a day.

The sailor's duty being discharged, the master is to pay him finally; and by statute(111), on the

(110) *Laws of Wisbuy*, 54; and see 27th article of laws of Oleron.

(111) 2 Geo. II. ch. 36. made perpetual by 2 Geo. III. ch. 31. sec. 7. The *Consolato del Mare* says, in cap. 135.

arrival of any vessel in Great Britain from parts beyond the seas, the master shall pay the seamen their wages, if demanded, in thirty days after the vessel being entered at the custom-house (except when a covenant shall be entered into to the contrary), or at the time the said seamen shall be discharged, which shall first happen (deducting out of the wages the penalties by that act imposed,) under penalty of paying to such seaman that shall be unpaid, twenty shillings over and above the wages to be recovered; and such payment of wages shall be good in law, notwithstanding any action, bill of sale, attachment, or incumbrance whatsoever. The ship, in fact, is pledged to them in preference to any other creditor.

By the laws of the American States, all wages, when the voyage is ended, are to be paid in ten days, or immediately, if the vessel is to depart again.

Suits for seamen's wages must be commenced within six years after the cause of action accrues (112).

Sailors in his majesty's service cannot be arrested for debts under twenty pounds.

*"Patrono di nave e tenuto a marinari, che del nolo che li sara pagato, lui debba pagare a detti marinari, & si il nolo non basta, lui se ne debbi fare imprestare, & si non trovera chi ne gli presti, la nave si debba vendere."* And again, ch. 136. *"Padrone e tenuto pagar gli salari alli marinari in quel loco, dove lui riceverà il nolo."*

(112) Fourth of Anne, ch. 16.

Having considered the duties and rights of naval persons, as far as they can be collected positively from our own maritime law, or by analogy from others, we proceed to make some few observations on the most usual maritime contracts which affect them, those relative to freight, charter-party, hypothecation, and average(113); all of which are, or ought to be, cognizable in the admiralty; nor do I see how that court could refuse to entertain them, or proceed on them, unless when prohibited.—These subjects cannot be pretermitted, though too trite to admit novelty, and too copious to suffer within our compass much more than definition and general principle.

#### OF CHARTER-PARTIES.

Charter-party (*charta-partita*) is the same in the civil law with an indenture at the common law, and is with us usually applied to the agreement made between owners of ships and merchants, who agree to hire the ship for the carriage of goods, and to pay therefor a sum or consideration, which is called freight. Our reasons for holding that the breach of these charter-parties, so that the penalty be not demanded, ought to be cognizable in the admiralty, have been already given.

(113) The contract of insurance, being now in practice uniformly and decidedly out of the cognizance of the admiralty, is not here considered.

If the master enter into a charter-party for himself and owners, he may release the freighters, without advising with the owners, otherwise not, though he has subscribed the charter-party(114).

The charter-party ought to contain the name and burthen of the vessel, the name of the master and freighters, the place and time of the lading and unlading, the freight(115), the time the vessel is to stay at the respective ports, and the conventions about demurrage, with penalties on both sides for non-performance.

If the time of lading and unlading be not regulated by the charter-party, it must be determined by the custom of the port. If the time of the freight be omitted, it shall only commence from the day the ship sails.

A complete embargo, occasioned by war or reprisals, dissolves the charter-party; a temporary stopping of a port doth not.

Bills of lading differ from charter-parties, in that they relate to part only of the cargo; whereas the other are made with those who freight the whole ship. They should contain the quality, quantity, and mark of the goods; the names of the persons lading, and of the consignees; the places of departure and unlading; the names of the master and ship, and the value of the freight;

(114) Beawe's *Lex Mercatoria*, 133.

(115) *i. e.* the sum to be paid for freight, for sometimes the cargo is called the freight.

and they should be triple, one remaining in the hands of the lader, another in the hands of the master, and the third sent to the consignee. They are sometimes distinguished from charter-parties, in that they determine the contents of the cargo ; while the charter-party settles the terms of carriage.

The indorsement and delivery of a bill of lading is, *prima facie*, an immediate transfer of the legal interest in the cargo(116). But where the intention of the parties appeared to have been only to bind the net proceeds, in case of the arrival of the goods, an insurance on account of the indorser, after such indorsement, was held good (117).

Where several bills of lading of different imports have been signed, no reference is to be had to the time when they were signed by the captain, but the person who first gets legal possession of one of them, by delivery from the owner or shipper, has a right to the consignment(118).

#### OF FREIGHT.

By *freight* is usually meant the sum agreed upon between the merchant and ship-owner for the hire of a ship, or carriage of goods. The

(116) *Hibbert v. Carter*, 1 Term Reports, 745.

(117) *Ibid*.

(118) *Caldwall v. Ball*, 1 Term Reports, 205.

ship may be hired either in part, or in the whole, for an entire voyage, or by the month. It may arise not only by the terms of a charter-party, or by a verbal agreement, but also by common usage, the amount in such case to be determined by the custom.

The cargo is tacitly bound for the freight, which is preferred to all other debts affecting the cargo, though prior in time; and if the cargo be damaged, the owner of the cargo has in his turn his remedy against the ship or its owner.

If either party fails in his part of the contract, the other is free, (though it may be imprudent too rigidly to insist on the strict letter of the agreement.) And he has also his remedy in damages against the party who failed in fulfilling his contract.

Let us compare the old maritime laws on this subject with modern decisions.

By the old marine laws, if a ship be so disabled that she cannot proceed in her voyage, the merchants, on their goods being returned to them, were to pay freight in proportion to the way the ship has made(119); or the master may hire another ship.

If the cordage was good in itself, and any accident happened by its breaking, the damage was equally divided between the merchant and

(119) Laws of Oleron, article 4th.

ship(120); at present this is usually provided for in the charter-party.

If the merchant delayed the sailing of the ship fifteen days beyond the time within which by his agreement she was to be laden, he was to make satisfaction for the delay(121). In our modern charter-parties, a time is mentioned, usually ten days.

It was not lawful to sell or mortgage a ship let out to freight, but it was lawful to freight it, or underlet it to others for the same voyage(122).

If the voyage fail by the act of God, or that of an enemy, the freight was not lost.

If a ship freighted for a voyage was sent upon another, and longer, and no protestation against it, the freighter was to pay but half the damage that might happen to such ship, in such longer voyage or voyages(123).

If a ship freighted for one port enter another, the master, together with two or three of his chief mariners, ought to clear themselves upon oath, that it was by constraint and necessity they went out of their way(124). So if the voyage be prevented by embargo, freight was not to be paid.

The master might always retain the merchandize until paid his freight(125). Whether he

(120) Laws of Oleron, article 10.—(121) Ibid. article 21.

(122) Laws of Wisbuy, article 10.

(123) Ibid. article 11.—(124) Ibid. 53.

(125) Ibid. 57.

has any lien on them when let out of his hands, has been discussed before(126); and goods once delivered to the master, were not attachable in his hands.

Let us now see how far modern determinations agree with these ancient rules.

It is said, that by the law of England, freight is not payable if the goods are lost by piracy or shipwreck, though the civil and marine laws are otherwise. Bright and Cowper, Brownlow. But see Douglas, cap. 464. *contra*.

In case of embargo, the charter-party is dissolved without charges to either party; the merchant is to pay for unloading his goods.

If a ship is freighted to go to any place to load, and on arrival there the factor cannot, or will not, put any thing on board her, after the master has staid the days agreed on by the charter-party, and made his regular protests, he shall be paid empty or full.

When a ship is freighted out and home, there is no freight due till the whole voyage be performed, so that if she be cast away coming home, the freight outwards, as well as inwards, is lost; and so in a very modern case it was ruled, that if the charter-party covenant that goods be delivered at one place, freight cannot be recovered *pro rata itineris*, if the ship be wrecked at ano-

(126) See Smart and Wolf, 3 Term Reports, and Douglas, p. 100. Bright and Cowper, Brownlow, part 2d.

ther before her arrival at the latter, though the defendant accepted the goods at the former(127).

If one let his ship for a voyage, agreeing to keep it in repair during the whole time, and the ship for its safety is obliged to put into port to refit, he bears the whole expence(128).

If a freighted ship becomes disabled on its voyage accidentally, and without any fault of the master, the master has his option either to refit it (in convenient time) or to procure another ship to carry the goods. If the freighter disagrees to this, and will not suffer it, the master shall yet be entitled to his whole freight, as of the full voyage.—And the master (if in no fault) is at all events, and though he neither refits his own ship, nor procures another, entitled to freight *pro rata itineris*, i. e. in proportion to such former part of the voyage as he has already performed. The value of the goods, or what they sell for, or whether they were spoiled or not, was nothing to the master, because the freighter took them; and he must take all that was saved or none. But the master had earned his freight by carrying them. If he had abandoned all, he had been excused freight. These rules, laid down by Lord Mans-

(127) 7 Term Reports, p. 381.

(128) 8 Term Reports, p. 509.

field in a modern case(129), will be found to originate in, and not materially to differ from, those of the ancient maritime laws above cited.

These cases and rules respecting freight, seem reducible to one or two general principles of reason. Accordingly as the master or owner of the ship, or the merchant freighting, incurs the blame of miscarriage, or failure of undertaking, freight is or is not to be paid. If there be in any cases an apparent deviation from this rule, and a seeming want of equity, it arises from the special nature of the agreement, and the time, terms, or mode for, on, or in which the ship is let or taken to freight. If none of the contracting parties are in fault, and the failure is occasioned by an act of government, neither party suffers. If by the act of Heaven, or of an enemy, the ancient and modern laws are said to differ, though I believe they do not.

#### OF HYPOTHECATION AND BOTTOMRY.

This contract originated with the Roman law. In the law *de exercitoria actione*, in the Pandects, it will be seen that the master might, from necessity, take up money on the credit of the ship; and in their laws, *de nautico fœnore*, some small regulations are mentioned on the subject; but

(129) 2 Burrow, from 887 to 891. Compare this with laws of Oleron, Article 4.

bottomry, as at present understood and practised, is a contract which has grown up to importance even since the time of Grotius, who has given therefore little information on the subject.

Bottomry is a contract for money lent upon the vessel, on condition, that if the ship be lost, the lender loses his money; but if the ship return in safety, he is to receive his principal, and also interest, even beyond the legal rate, on account of the extraordinary hazard, and for the benefit of commerce(130). The master, as we have seen, cannot hypothecate the ship, except for its own necessities, and that abroad; and the vessel itself is thereby subject to seizure in the court of admiralty to satisfy the debt, but no one is personally liable. And in the common case of money lent on bottomry to the owner, the ship and tackle, if brought home, are liable, as well as the person of the borrower; the latter, by his express contract, the former both by that and the maritime law; it has been already strongly argued, that the former part of the contract at least ought to be cognizable in the admiralty.

Hypothecation then may be distinguished from bottomry; the former usually signifying the pledging of the ship or cargo by the master abroad, which binds only the ship. The latter, a con-

(130) See Molloy de Jure Maritimo, 361. Malyne's Lex Mercatoria, book 1. ch. 31. Bynkershoek, lib. 3. ch. 16. De contractu qui dicitur bodemery.

tract by the owner at home, binding by his own words both ship and person.

If the money be lent on the goods or cargo at home, the borrower alone is personally liable, and is said to take up money at *respondentia*.

If the money be borrowed not on the ship and goods, but on the mere hazard of the voyage, this agreement was sometimes called also bottomry or *respondentia*,—and sometimes *fœnus nauticum & usura maritima*; but this giving an opening for gaming contracts, was curbed by statute 19 Geo. II. ch. 37, enacting that all monies lent on bottomry or *respondentia*, on vessels bound to or from the East Indies, should be expressly on ship or cargo, that the lender was to have the benefit of salvage(131), and that if the borrower had not an interest in the ship or effects, equal to the sum borrowed, he should be responsible, though the ship were totally lost.

By the Roman law, every contract of the master's, not exceeding his authority from the owners, bound them: they authorize him abroad to hypothecate the ship, but whether to bind them if the ship be lost, or beyond its value, and that of the cargo, has been a *vexata quæstio*, by us discussed before.

(131) Bynkershoek holds that he is so in every case, and that the lender cannot suffer if the voyage be changed, any more than an insurer; otherwise his risk continues to the very last port.

It is said in *Justin v. Ballam*, 2 Lord Raymond, 805, that every contract of the master is an implied hypothecation of the ship by the maritime law. In what maritime law is this said? It was not in the Roman law. It produced indeed a lien by that law, and a priority to other creditors, but that lien was enforced by the *actio in factum*, and was very different from an hypothecation, for which the redress was by the *actio hypothecaria*.

#### AVERAGE.

Average is a word of ambiguous signification, sometimes meaning the damage incurred for the safety of the ship and cargo; sometimes the contribution made to repair that damage. It is most commonly taken for that contribution which merchants and others do proportionably make towards their losses who have their goods cast into the sea for the safeguard of the ship, or of the goods and lives of them in the ship, in time of tempest(132).

It is either general or particular. *General* average is for a loss incurred, towards which the whole concern is bound to contribute *pro rata*, because it was undergone for the general benefit and preservation of the whole. *Simple* or *particular* average, means damage incurred by, or for, one part of the concern, which that part must bear alone; so that in fact, it is no average

(132) Molloy, book 2. ch. 6.

at all, though the expression be in familiar use(133).

The great principle of average, or which determines whether parties shall contribute or not, is the loss having been suffered, or the act done voluntarily, for the benefit of the property of the contributors. It is not their consent, for goods may be thrown overboard against their consent, if the majority of the mariners or persons on board think it necessary; though it is at the peril of those who do so, if the necessity be afterwards disproved; nor is it every loss, for if masts or yards be destroyed by the force of a tempest, and not voluntarily cut away to prevent danger, there is no contribution for the repairs of the ship; upon this ground it has been determined with some subtlety, that when the cable was cut to save the ship, there was no contribution for the anchor lost, the will not having extended thereto; and it has been disputed whether, when a ship was voluntarily run ashore and lost, but the cargo saved, it should contribute, because the rule was, that no contribution took place when the ship was lost; but it was truly held that the rule would be absurdly applied to a case where the ship was grounded purposely to save the merchandize, and that with success.

In illustration of the same principle, let me

add, that it has been held, that where a ship has been driven on shore by a tempest, and the cargo saved, it shall not contribute to the loss of the owner of the ship, for the ship was not exposed to the danger voluntarily for the benefit of the cargo; and on the other hand, when the cargo put into lighters (the ship not having depth of water to come higher up the river) has been lost, the ship doth not contribute, for its benefit was not in contemplation in the unloading into the lighters.

Other cases occur of more difficulty, e. g. if the necessity of throwing goods overboard arises from the mariners' misconduct in the manner of loading the ship; here the better opinion seems to be, that if the mariner be solvent, he shall pay the damages; if not, though he alone was the offender, yet, as when the danger occurred, all were benefited by the *jactus*, all shall contribute.

Contribution is not confined to the instance of goods thrown overboard. It may extend itself to many other cases, e. g. if a ship be ransomed, where ransoms are legal, all the owners of ship and goods contribute, for it is for the benefit of them all.

Our next considerations are, in cases where contribution is proper, who shall contribute, what shall contribute, and how the goods lost are to be estimated?

All persons(134), for whose benefit the act was done, the freighters, the master, the owners, the sailors, the passengers, must contribute. The sailors only are allowed, by the old marine laws, a certain little *peculium* free from contribution.

All things in the ship, except the victualling and provisions of the ship, and the bodies of the men (unless servants) must bear a proportionable share in the contribution. Doubts were formerly held, whether money and jewels contributed, but they are now certainly included in the general rule.

The goods saved and lost are to be estimated according as the goods saved were sold, freight and all necessary charges being first deducted, and then a proportionable value is to be contributed by the goods saved.

The master ought not to deliver the goods till the contribution is settled, they being tacitly pledged, as they are for the freight(135).

#### LAW OF TORTS.

If a wrong be done to the person civiliter upon the seas, though the case of *Le Caux* and *Eden* related to the prize court, yet, as has been before observed, the reasoning therein appears to me to apply to the instance court, and to shew that in

(134) *Bynkershoek, Quæ. Juris privati. cap. 24. Molloy, book 2. ch. 6. sec. 14.*

(135) *Molloy, passim.*

any such case redress may be had in the admiralty; the damages to be assessed by the registrar in the manner pointed out by that case.

If the injury was done to the property upon the seas, (for in the case of torts I admit that locality not only is, but ought to be, the criterion of jurisdiction); in like manner remedy is properly had in the admiralty.

In the former case, the person is arrested; in the latter the ship, by the mere common process of the Roman law *in rem* (136).

The positions which I have here laid down seem to me to be fully confirmed by the following opinions (coming from a very high authority indeed) as indeed they are by common practice.

In the reign of King Charles II. France being at war with Holland, a Dutch caper seized two English ships, robbed them of their cargoes, alleging them to be French, and put the crews to the torture; though by the law of nations, free ships do not make free goods; yet by an express treaty with Holland at that time, French goods in English bottoms were not seizable.

In a letter from Sir L. Jenkins to the lords of the admiralty, Vol. II. p. 774. who had consulted him on this affair; he says, the owners

(136) In cases of collision, the person is not arrested. Doth not this shew again that the arrest of the master or owner for seamen's wages must be on their personal contract?

and masters of these English vessels have a good action of spoil and damage, *as we term it*; nor do I know that this action can be any where but before your lordships in the court of admiralty, where the merchants and owners are to proceed by process, in order to be repaired, against the ship and the commander; the merchants for the loss of their goods, the owners for the ship's loss of time, and being forced out of its course.

As to punishing the captain for his threats, and his officers for torturing the pilot, the way is at the admiralty sessions of oyer and terminer.

In the mean time the men may be committed to the *Marshalsea*, and the ships continue *under arrest*.

In another place he declares, that an action of trover for a tort at sea, is an invasion of the rights of the admiralty(137).

Of torts or injuries done to things, that of most frequent occurrence in naval affairs, is the running foul of one ship against another, or the impinging upon an anchor, or other injurious impediment negligently left in the way.

This may either happen where two ships are too near each other in port, or where one is at

(137) The *Marshalsea* then appears the proper prison; and arrest of the ship the proper process, when acting *civiliter*, 2 vol. 777.

anchor, the other under sail ; or where both in sailing strike together.

The Roman law ordained, that if the injury happened by accident, and without the fault of either party, that it was to be considered as the decree of fate, quietly to be submitted to by the sufferer, without his being entitled to any reparation ; but if the party occasioning the accident was in fault, he was to make full restitution and reparation to the injured(138).

The laws of Wisbuy, which are particularly regarded and followed in Holland(139), require masters of ships to fasten buoys to their anchors, on pain of paying for all damage that may happen from the want of them ; and ordain, that if a ship under sail doth damage to another, the damage is to be borne by the ship that did it, unless her mariners swear they could not help it, and then to be borne by each equally(140).

By another article of the same laws of Wisbuy(141), if two ships strike against one another, and receive damage, the loss shall be borne equally between them, unless the men on board one

(138) See the Aquilian law, and Bynkershoek's Commentary on it.

(139) *Quibus nos fere utimur, ut Romani legibus Rhodiis*, says Bynkershoek.

(140) Articles 29, 51 and 71.

(141) Articles 50 and 67. See a remarkable case of *Briggs v. the Perseverance* in the Appendix.

of them did it on purpose; in which case that ship shall pay all the damage. And if two ships strike against one another (I suppose it is here meant by accident) and one of them unfortunately perishes, the merchandise that is lost out of both of them shall be valued and paid for *pro rata* by both owners, and the damage of the ships shall also be answered for by both, according to their value.

This subject has been very accurately and minutely considered by Bynkershoek, and the purport of his observations, which seem to me worthy of being here inserted, is as follows(142):

Where the damage was done by design, the Roman law is followed, but the mercantile world was not reconciled to the idea, that where it happens by accident, the doer of it should be perfectly free from the obligation of making some payment or retribution, because if so, it would always be imputed to accident, and it would often be extremely difficult to prove the contrary; on the other hand, if the principles of the *noxal* action of the Romans, and of the action de *pau-perie* were here applied, viz. that the thing which was the immediate cause or instrument of damage, should be given up, or otherwise the whole damage paid, it would be too severe a rule to be applied,

(142) *Quæstiones juris privati*, from the 18th to the 23d chapter inclusive. He himself says, the law on the subject much wanted an interpreter.

if the case really happened by accident and misfortune : they therefore chose a middle course. In case of accident, the loss was to be divided between both parties, in equal proportions ; in case of wilful fault or negligence, the guilty person was to pay the whole.

In case of accident, however, the party may, if he pleases, relinquish the vessel from which the mischief proceeded, with analogy to the Roman actions above-mentioned, and that of *damnum ab ædibus ruinosis datum*.

In this case of accident (though by the Roman law, if there be a number of owners, the act of the master makes each of them liable *in solidum*, or for the whole) each owner is only liable to contribute in proportion to his share, for that rule of the Roman law applies only to acts which the master is authorized to do ; and Bynkershoek humorously observes, "he is not authorized or "instructed to run down ships."

If the injury has happened through fault, and that the fault of the sufferer, e. g. by not carrying lights at night, he plainly gets no reparation. If by the fault of the other, he pays the whole damage ; but Bynkershoek imagines that the master of the ship only is liable, it being an act not authorized by the owners ; and this may so far be true, that the owners shall not be liable beyond the value of the ship(143).

(143) The principle followed on the continent, and that of the civil law, is, that abandoning the ship in such a case, doth not discharge the wrong doer.

These doctrines, adopted by the great Dutch jurists, are certainly guides in our courts. The various cases of such damage, as one ship may be at anchor, or both under way, &c. are well put in Roccus.

The laws of Oleron say, that if a vessel moored and lying at anchor be struck by another vessel under sail, the damage shall be in common, because old decayed vessels have sometimes been purposely put in the way of better; and if in harbour, where there is little water, the anchor of one lies dry, the other may remove it, and the party preventing him must answer the damage; and every ship not having a buoy to the anchor, is liable for any damage happening thereby. Articles 14 and 15.

## CHAPTER VI.

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### ON THE JURISDICTION OF THE PRIZE COURT.

THINGS taken on the high seas, *jure belli*, out of the hands of the enemy, are things of prize(1); and all questions of prize at sea belong *exclusively* to the admiralty jurisdiction(2).

In matters of prize, the rule which the civilian so much, so justly, but so unsuccessfully, laboured to establish in the instance court, is universally confessed and admitted; that the jurisdiction depends not on locality, but on the subject matter, which is governed by the *jus belli*, and not by the rules of the common law(3). The jurisdiction too is *exclusive*. A thing done upon the high seas, unconnected with prize, doth not exclude the jurisdiction of the common law: for instance, for the seizing, stopping, or taking a ship, not as prize, an action will lie; but for taking as prize, no action will lie. The nature of the question excludes not the locality(4).

(1) 1 Robinson, 283.

(2) Douglas, 572 to 591.

(3) Douglas, 586.

(4) Douglas, 592.

The history of the prize court has been deduced with great learning by Lord Mansfield, in the cause of *Lindo v. Rodney*. Yet I own, it doth not appear to me that the laborious research of that super-eminent judge has removed all obscurity from the subject. That great man, indeed, observes himself, that his researches could not be extended to any high antiquity; that there were no prize-act books further back than the year 1641—no sentences further back than 1648—and that, down to 1690, the records are in confusion, illegible, and without an index.

He observes, that the jurisdiction in matters of prize (whether coeval with the court of admiralty, or, which is more probable, of a later date beyond time of memory) is quite distinct from the ordinary jurisdiction of the court of admiralty, though exercised by the same person; and that, in the ordinary commission under the great seal, there is no mention of prize.

That to *constitute* the prize authority, or to *call it forth*, in every war a commission under the great seal issues to the lord high admiral, to will and require, and authorise the court of admiralty, and the lieutenant and judge of the said court, and his surrogates, to proceed upon all captures, seizures, prizes, and reprisals, of all ships and goods that are or shall be taken, and to hear and determine according to the course of the admiralty and the law of nations.

That the monition and other proceedings, after reciting his titles, add emphatically, "and also to hear and determine all and all manner of causes and complaints, as to ships and goods seized and taken as prize, *specially constituted* and appointed."

That the whole system of litigation, proceeding, and jurisprudence, in the prize court, is peculiar to itself; and it is no more like to the admiralty, (*i. e.* to the instance court) than to any court in Westminster hall. The instance court is governed by the civil law, the laws of Oleron, and the customs of the admiralty, modified by statute law. The prize court is to hear and determine according to the course of the admiralty and the law of nations.

That the end of a prize court is to suspend the property till condemnation; to punish every sort of misbehaviour in the captors; to restore instantly *velis levatis* if, upon the most summary examination, there do not appear sufficient ground—to condemn finally, if the goods really are prize, against every body, giving every body a fair opportunity of being heard. A captor may and must force every body interested to defend, and every person interested may force him to proceed to condemn without delay.

That these views cannot be answered in any court of Westminster hall, and therefore they have never attempted to take cognizance of the question, *prize or no prize*, not from the locality or the act

being done at sea, since for seizing a ship at sea *not* as prize an action will lie, but from their incompetence to embrace the whole of the subject.—Douglas, 592.

All this is clear; but when the illustrious judge expresses his doubt whether the jurisdiction in matters of prize be coeval with the court of admiralty(5), or, which is more probable, of a later institution beyond the time of memory—when he doth not inform us at what time a prize commission distinct was first granted—and when he uses the ambiguous expression, that it is granted to *constitute* this authority, *or to call it forth*(6), thereby intimating a doubt whether it be not always, at least latently, inherent; and leaving us at a loss to know whether it could or could not be granted to any other person(7)—and when he

(5) These are his words; he doth not say the *instance* court, but seems to distinguish the court of admiralty from the court of prize.

(6) The words of Sir James Marriott upon this subject are remarkably, if not studiously, ambiguous.—“It is singular,” saith he, “that in the patent of the judge of the admiralty, no *particular* jurisdiction of prize is *expressly* given.”

I have seen an opinion of Sir W. Wynne, that though the admiralty of Scotland has no special prize commission, yet it hath cognizance of prize causes under its general commission. Sed quære, if it be like other general admiralty commissions?

(7) Douglas, 595.

afterwards says, "since Queen Elizabeth's reign, the judge of the admiralty, *either* by an inherent power, or by the king's commission, *or* both, has solely exercised prize jurisdiction"—it seems pretty evident, that this great luminary of the profession was not able, on this occasion, to imbibe or to diffuse clear and satisfactory light.

Without pretending to decide whether the admiral hath a right exclusively to claim the prize commission whenever it doth issue(8), though the words of the monition above recited would seem to shew he has not(9), I strongly suspect that, before the last century, he did exercise a jurisdiction over prize without any special or distinct commission; and certain it is, before Britain had a regular or royal navy, that the admiral, as we have seen in the chapter of droits, was entitled to a very considerable share of prize ships or cargoes taken; besides, no prize commission having issued, as far as appears, in ancient times, how could he have then exercised the authority, unless it was considered as inherent?

Such being the nature and origin of the prize court, I next proceed to the extent of its jurisdiction as described by Sir William Blackstone.

(8) Such a claim hath been very strongly urged by the admiralty court in Ireland, where, indeed, it was insisted that the ordinary commission included prize.

(9) For those words are, *specially constituted* and appointed.

“In cases,” says he, “of prizes, in time of war  
“between our own nation and another, or *between*  
“*two other nations*, which are taken at sea, and  
“brought into our ports, *the courts of admiralty*  
“have an undisturbed and exclusive jurisdiction  
“to determine the same according to the law of  
“nations.”

On every part of this definition or description it will be necessary to observe, because in every part of it the learned commentator's words seem to be either erroneous or unguarded.

The first part, which says that the jurisdiction of which he speaks extends to prizes between our own nation and another, leaves us at a loss to know whether he includes questions as to captures by the enemy, where there has been no recapture, which has been, though I think unreasonably, doubted. The ground of this doubt was, that we never can consider a capture by the enemy, even followed by a condemnation in their courts, as binding upon us—as legal prize—or as altering the property. This I conceive to be manifestly false, though it was once, to my surprize, strenuously urged in a court of justice. Suppose a ship taken by the enemy, and regularly condemned in their courts, should, without recapture, by some *accident* or stress of weather, come into our ports; she would, I conceive, become a *droit* of admiralty. Suppose she had been purchased by a neutral, which purchases England allows, though France

doth not(10), and that the question was, whether there had been a legal sentence of condemnation to alter the property in a suit or claim made by the former British owner; surely the suit would be not in the instance court, nor by action at law, but in the prize court, the vessel having been taken *as prize*, whether she had become legal prize, and the property been altered or not(11).

Our law on this subject must have been the same with that of other nations; and Sir Leoline Jenkins observes in his time, that the parliament of Paris had determined, that ships are not recoverable *jure postliminii*, when they *happen* to return from an enemy's possession to their own country; and that the laws of Spain and Venice allowed the property to be altered even in the hands of pirates.

(10) 1 Robinson, p. 124.—the case of the *Velvaart*, and of the *Juffrow Anna*, both in the prize court.

(11) I have been more particular on this subject, because an extraordinary idea was introduced in Ireland more than once, viz. that a question between the neutral purchaser of a ship taken by the French, under an illegal sentence of condemnation in Norway, and the former owner (where the ship was sent on a voyage to our ports by the purchaser) was not a prize question, but cognizable only at law, or in the instance court of admiralty. The case of the *Perseverance*, 2 Robinson, 239, which was in the prize court, is directly in point. In that of the *Flad Oyen* there was a recapture. But the case of the *Kierlighett*, 3 Rob. Rep. is decisive.

The next position of Judge Blackstone, that the jurisdiction of the prize court extends to questions of prize between two other nations, is, as I apprehend, absolutely false, if the learned writer meant, as his words seem to import, that this is, while those two other nations are at war, and we at peace. It never can be supposed, or presumed, that a neutral government will so far depart from the duties of neutrality, as to permit the condemnation of the property of one belligerent to another, which would be a direct and avowed act of hostility. I will not say whether such a condemnation would alter the property, but it would be an implied declaration of war. When, therefore, we read of condemnations in the ports of a third power being held to be valid, we shall find it was when that third power was also at war with the nation of the captured, and linked in alliance with the captors, and not when it was perfectly neutral. And such was the late case of the *Christopher*, in the second volume of Dr. Robinson's Reports(12).

So far from the neutral having any such right, consistent with a state of peace, of condemning the property of one belligerent power to another,

(12) It is, however, laid down generally, that according to the law of nations, prizes may be brought into neutral ports to sell them, by Bynkershoek, lib. i. ch. 15. Vattel, book iii. ch. 7. sec. 132; and this opinion seems to be adopted by an able man, Dr. Kent, now professor of law in Columbia College in America, in some dissertations in my possession.

it was formerly doubted whether it was not obliged by its amity with the captured (even where the ship was not taken within their dominions, but only brought in), to rescue him and his property from the power and force of the enemy, and *jure postliminii* to compel restitution. This question was put by his majesty King Charles II. to his judge of the admiralty, who answered, "The law of nations, as at this day observed, seems not to pass any obligation on your majesty to impart your royal protection unto one friend to the prejudice of another; and the French ordinances do expressly provide, that leave be given to all strangers to depart their ports with such prizes as they bring in, and this is the practice of Spain and of all other ports."

The last thing to be noted in Sir W. Blackstone's account of the extent of this jurisdiction, is his expression, *the courts of admiralty* have an exclusive jurisdiction of prize. He would *seem* here to give an opinion, that this jurisdiction is either *inherent* in the courts of admiralty, or at least, that when *called forth*, it can be exercised through no other channel. And yet the probability is, that the learned author was not thinking of any such question, nor meaning to give any opinion upon it(13).

(13) If we wanted any further proof of the loose mode of expression here used, the plural courts will shew it. What is meant? There is but one prize or high court of admiralty in England, with its dependencies. He cannot

It has been observed, that locality has no effect on the prize jurisdiction—it is co-extensive with its subject matter, and pervades the land as well as the sea.

Hence it is that the prize court may adjudge of captures happening *on land* in consequence of a naval force, which was the famous case of *Lindo and Rodney* already mentioned: and hence it is that prize goods, or goods taken on the high seas *jure belli* out of the hands of the enemy, when or

mean vice-admiralty courts; he cannot mean the prize and instance court. The truth is, Blackstone's Commentaries are a most useful, great, and precious work, but by no means implicitly to be depended upon. Let not the author of this be suspected of vanity: if he, or any elementary writer, be guilty of as few errors as Sir W. Blackstone, he will be fortunate indeed. Such works as this bear no proportion in importance or extent to his, any more than in the abilities of the author: but let us not be blind. Besides the political errors often marked in that great work, there are many legal ones. Take this instance, as yet I believe unnoticed. "An acquittance for rent," saith he, book iii. ch. 23, "in full of all demands, is so violent a presumption of all former rent being paid, that no proof shall be admitted to the contrary." Surely this is not law, though I admit it carries a strong presumption; and so where he says *generally*, and *without exception*, in book ii. ch. 30. that want of consideration cannot be averred by the maker of a note. Can any thing be more inaccurate? These, however, are slight maculæ on that transcendent work, and I should be very far, on seeing on one of its smaller limbs any little defect, from misapplying the old adage, *Ex pede Herculem*.

though they come on shore, may be followed by the process of this court.

It is even a question unsettled, whether the prize court hath not jurisdiction over plunder and booty gained in a mere continental land war, without the presence or intervention of any ships or their crews. "It is often," says Lord Mansfield, in the case of *Lindo and Rodney*, "given to the soldiers on the spot, or irregularly taken by them, and disputes regulated by the commander in chief." But he proceeds to say, "there is no instance in history of any question about it, before any legal judicature in this kingdom; and perhaps, any attempt to claim jurisdiction over it in the prize court of admiralty, might be opposed by the subject matter, the nature of the jurisdiction, the person to whom it is given, and the rules by which he is to judge(14)."

The cognizance of the principal, as hath been repeatedly observed, draws that of the incident to it; and hence controversies have arisen whether certain matters were or not necessarily incident to a prize question. I shall give one or two instances by way of illustration.

Whether the question of freight must be determined by the same court which determines the principal question of prize? e. g. Whether a neutral master must here claim against the captor who has taken goods as prize(15)? was one of

(14) *Douglas*, 592.

(15) See *Smart v. Wolf*, 3 Term Rep. 332 and 336.

the questions discussed in a remarkable case. It was justly determined(16) that it was, and that the common law could not, in such a case, take cognizance of freight ; because it involved in it the question of prize, and whether or not the goods were contraband, and many other questions which depend on the treaties with foreign powers, of which the law courts know nothing, all which must be subjected to the decision of some forum(17), governed by the same rules in all countries.

Whether the claim of a former owner against a neutral purchaser, in a neutral port, of a ship taken as prize(18), be proper for the instance or the prize court of admiralty, though in my humble opinion(19), no question at all, has been hotly disputed in various suits in the kingdom of Ireland since the year 1793, the instance court of admiralty there (the judge in that kingdom having no prize commission) pretending to jurisdiction in such cases, and applications being in consequence made to the courts of law for writs of prohibition, not without argument that the courts of law themselves were the proper

(16) See Lord Kenyon's opinion, 3 Term Rep. 341.

(17) The claim of freight is liable to many exceptions which cannot be discussed without the prize question.

(18) Whether in such case there has been a sham sentence of condemnation by an unauthorized court, or no form of sentence of condemnation whatsoever, doth not affect the question above.

(19) See Douglas, 590.

jurisdiction. I think there can be no doubt that such a question, at least as an incident, belongs solely to the court of prize. The defence must always involve the question of prize. It is impossible to separate the two questions. No metaphysical subtlety can do it, by saying that the sale on land was not one continued, but a severed act, or in any other way; the question must still revert, was it lawful prize or not. The question is—is the property changed or divested out of the original owner? and this was so, if lawful and complete prize are identified and the same; and the taking *as prize* vests the jurisdiction of the prize court, though the capture should afterwards turn out to be illegal or incomplete(20). Lord Mansfield has expressly said, that the taking a ship upon the high sea, not as prize, is triable at law to repair the plaintiff in damages; but the taking upon the high sea, as prize, is not triable at law; and in fact, in England there never was a doubt about it(21).

(20) Douglas, 593.

(21) See the cases of the *Flad Oyen*, Robinson's Admiralty Reports, 1 vol. and of the *Perseverance*, Pitter, same work, 2 vol. In the first there was a re-capture; in the latter none. See also the case of the *Kierlighett*, 3 Robinson's Reports, decisive that such are cases only for the admiralty prize court. Where the admiralty decide that a ship is no prize, they may entertain a new libel against the captors, to make them account to the captured. 4 Term Rep. 385.

It was an extraordinary argument urged in this case, that re-capture is necessary to found the jurisdiction of the prize court, and that the sentence of a foreign court of admiralty, in an enemy's country, can never be by us regarded. Is not the sentence of such a foreign court of admiralty, every day in insurance cases, ruled to be conclusive as to all matters within its jurisdiction, and contained in its sentence? Douglas, 559, and are not sales (of vessels captured from us) to neutrals, under the sentences of the courts of admiralty of France, held valid? 3 Robinson's Rep. 96. The French captor certainly cannot set up such a sentence against the first owner, but a neutral purchaser may.

One more question will suffice, that in *Lord Camden v. Home*(22); in that case, the nature of which shall be more particularly mentioned presently, a matter arose incidentally, viz. the construction of an act of parliament in order to found their opinion on the principal question. It was admitted that the principal question was within the jurisdiction of the prize court, nor was it denied that it had of course cognizance of all incidental matters arising necessarily therefrom; but it was argued, that if this court decided such incidental matters differently from the common law courts, it was ground for prohibition; but the argument was over ruled, and the contrary doctrine established.

(22) 4 Term Rep. p. 390, &c.

It has been already said, that the courts of law, sensible of their inability to try the matter of prize, never have attempted to restrain the jurisdiction of the admiralty prize court to the land, or to control it by the principle of locality. It is almost to repeat the same thing in different words, when we add that they never have entertained any jealousy of this court; that the restrictive statutes of Richard do not apply to it; and that prohibitions to this court are unknown. Each of these positions, however, may require illustration in terms somewhat more particular, and have received it from Lord Mansfield in *Lindo v. Rodney*, whose observations shall here be repeated, or the substance of them.

And first, the jurisdiction of the prize court is not confined to the sea; and in the very case just mentioned, it was determined to extend to a capture made *at land* by the assistance of a fleet, or in consequence of a surrender to ships at sea, the prize jurisdiction depending not on locality, but on the subject matter, which is governed by the *jus belli*, and not by the rules of the common law. The incompetence of the courts of law to embrace adequately such questions from their very nature, and the fitness and adequacy of the prize court to decide them, has been already dwelt upon. The competency of the prize court to follow them on land, appears from the following considerations. First, from the general words of the commission, and the reason of the thing

which requires that the words should be general, because there never was a single ship, much less a fleet, which has sailed to make reprisals against an enemy, which had it not in view to act on shore, if occasion should offer, nor can it be otherwise. The words of the prize commission therefore are general.—*All manner of captures, seizures, prizes, and reprisals of all ships and goods,* it doth *not* say, *upon the sea*; it doth *not* say, *goods in the ship*; it uses the word *reprisals*; the most general word that can be used; and it doth not make it necessary in the libel to say that the cause of action arose upon the sea.

Secondly, if the jurisdiction of the prize court did not extend to the land, miserable would be the condition of the captors, mischievous it would be to the fair claimant, and still more mischievous to the state. The prize thus made on land, could not be condemned; if granted, it could not be shared(23). *Every officer and sailor would be liable to actions without number*(24). The taking could not be disputed. They could only have *witnesses from abroad who could not be compelled to come*. The grounds upon which the prize

(23) For the prize court decrees distribution to be made according to his majesty's instructions.

(25) The passages in italics are so distinguished to mark how entirely Lord Mansfield agreed with Sir L. Jenkins, *supra*, as to the advantages of the admiralty court, while they, at the same time, in a very clear manner, point out to the reader wherein those advantages consist.

court condemns or acquits, could not be read at law, and in every action where the plaintiff recovered to the value of a farthing, the captor must pay the costs; thus colourable claimants would easily ruin the captors through their want of the means of defence.

It would be equally mischievous to fair claimants. They could not have their property restored instantly on their own papers, books, and affidavits. They must make formal proof; and the owners or crew of a privateer all the while might be spending the effects.

To the State, the consequences would be still more mischievous. No distinction can be made between British and Neutrals; if the jurisdiction be over-ruled in one case, it is in the other.

By the law of nations and treaties, every nation is answerable to the other for all injuries done by sea or land, or in fresh waters, or in any port. Mutual convenience, eternal principles of justice, wise policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. *Every country sues in those courts of the others, which are all governed by one and the same law, equally known to each.* The claimant is not obliged to sue the captors for damages, and undergo *all the delay and vexation* to which he may think himself liable, if he sues by a form of litigation of which he is totally ignorant, and sub-

jects his property to the rules and authority of a municipal law by which he is not bound.

His lordship then proceeds to observe, that every reason which created a prize court, as to things taken at sea, extends equally to things taken on land.

The instance court is not allowed to take cognizance of matters arising in *ports, havens, or rivers*, within the body of a county. But the prize court has uniformly, without objection, tried all captures, though within *ports, havens, &c.* in this realm. *The nature of the ground of the action (prize or no prize) not only authorizes the prize court, but excludes the common law.*

The consequence of the doctrine above given is, that the courts of common law, in all their alterations with the admiralty, never shewed any jealousy, or made any complaint of that part of the jurisdiction which related to prize, never attempted to control it, and never have granted a prohibition<sup>(25)</sup> to that side of the court: and it is acknowledged that the famous statutes of Richard II. and Henry IV. relate only to alleged usurpations of the instance court, in causes *civil and marine*; to contracts, pleas, and quereles, which were declared to be only triable at law, and that there is not a word in any of

(25) See prohibitions refused in *Brown v. Franklin*. Carthew, 474; and in *Hubbard v. Pearce*, quoted Douglas, 597; and in *Lord Camden v. Home*, 4 Term Reports.

those statutes applicable to the prize court, nor a syllable about commissions to judge of prize.

Lastly, the legislature in several acts of parliament, usually called the prize acts, has recognized and referred to the jurisdiction of this court over goods taken on land *as prize*; for instance, the prize acts of the 17th and 29th of Geo. II. contain a clause that the lords of the admiralty shall grant a commission, at the request of the owner, to the captain of any ship, for attacking or taking with such ship, or with the crew thereof, any place or fortress *upon the land*, or any ship or goods belonging to, or possessed by, &c. and the statute 19 Geo. III. meaning to express the same thing, takes the jurisdiction for clear and certain, and these are imitated by subsequent statutes.

Of these prize acts, making part of the law of the prize court, and therefore here demanding our attention, several have been made, one at least in each war during the eighteenth century; those in the reign of Queen Anne being the first which vested the sole property of ships and goods taken (being first adjudged lawful prize) in the captors. The subsequent acts have not very materially differed in their provisions, but as they were temporary, and intended only for the duration of the war; our present purpose only requires us to give the substance of that made

about the commencement of the present war, in 1793(26).

This act ordains that the officers and sailors on board every ship and vessel of war, in his majesty's pay, shall have the sole property in all captures (being first adjudged lawful prize in some of his majesty's courts of admiralty legally authorized) to be divided in such proportions and manner as his majesty orders by proclamation.

That all captures made by the ships of private owners, thereto commissioned by the lords of the admiralty, shall wholly belong to the owners of such ships and their crews, to be divided in such shares as may be agreed upon between them.

That prizes made by the army and navy conjointly, are to be divided as his majesty shall appoint; and for default of such appointment, at the discretion of the commander of the expedition, to be afterwards ratified by his majesty—but that the army is not to share in prizes captured on the voyage.

That deserters shall not share, nor officers deserting their convoy in order to chace, nor private ships of war with convoys, unless assisting

(26) The prize acts are,

6 Anne, ch. 13.

9 Anne, ch. 27.

13 Geo. ch. 4.

17 Geo. II. ch. 34.

29 Geo. II. ch. 34.

19 Geo. III. ch. 67.

21 Geo. III. ch. 15.

33 Geo. III. ch. 34 & 66.

34 Geo. III. ch. 70.

37 Geo. III. ch. 109.

by order ; and shares must be claimed within three years.

That prizes in the West Indies, until sentence, shall be under the care of the revenue, and the cargoes of all prizes are liable to duties.

That security must be given before letters of marque issue, and that they are forfeitable for smuggling ; that they may be revoked by the lords of the admiralty, but the king in council may supersede the revocation.

That ships captured by revenue boats belong to his Majesty(27).

It then provides, that the condemnation of prizes should be as speedy as possible—that the judges of courts of admiralty should, within five days after request, finish the preparatory examination of the persons commonly examined in such cases, in order to prove the capture to be lawful prize, or to enquire whether it be lawful prize or not ; and that the proper monition, usual in such cases, shall be issued and executed within three days after request.

That agents for sales of prizes taken by any of the king's ships, shall be nominated in equal numbers by the commander, the officers, and ship's company, or others entitled to such prize ; and the agents must exhibit their letters of attorney

(27) In the very last session, an act was passed to empower the granting commissions for captures to revenue cruisers.

in the court of admiralty within six months, on pain of five hundred pounds; to be registered in fourteen days after, on pain of one hundred pounds, on the registrar.

That bounty money shall be paid for taking or destroying the enemy's ships.

That the goods of British subjects, retaken from the enemy, shall be restored to the owners, paying for salvage one-eighth to ships of war, one-sixth to privateers.

That claimants shall, within a certain number of days, generally twenty, put in their claims, and within five days after give sufficient security to pay double costs, if the decision be against their claim, otherwise the judge is to proceed to sentence. That if further proof than the ship's papers and examination in preparatory be necessary, and delay occasioned thereby, or by an appeal being interposed, the capture may be appraised by sworn persons named by the captor, an inventory taken, the goods unladen, and put into proper warehouses under the locks of officers of the customs; and on security given for the value according to the appraisement, in case the same be adjudged lawful prize, delivered to the claimants, or on request sold by auction, and the money lodged in the bank; and the judge may, on security, give the capture a pass. Security for such costs as the court shall think proper to be paid, in case the alleged prize be not condemned, is also taken of the captors, before the interlocutory decree for

appraisement, sale, or restitution, on security to the claimants or their agents.

That if the claimants refuse to give such security, the judge may, on request of the captors, cause the said captors to give security to pay the claimants the value according to the appraisement, in case such capture be adjudged not lawful prize; and the judge shall then make an interlocutory order for the delivering the same, to the captors or their agents.

That no advocate or proctor shall be concerned in letters of marque or privateers, and that no registrar shall act as proctor.

That all papers found on board prize vessels shall be brought into the registry of the admiralty forthwith, but none except necessary papers translated.

That prize agents must give due notifications of payments in the Gazette.

That appeals shall lie to the lords commissioners of appeals in prize causes, of whom the major part present must be of the privy council(28).

The prize acts in the present war are, as to France, 33 Geo. III. ch. 34 and 66; as to Spain and Holland, 37 Geo. III. ch. 109; 34 Geo. III.

(28) The time within which appeals must be brought, or at least inhibitions taken out, has been very materially altered and affected by a very late act, 38 Geo. III. ch. 38; but this will come more properly in the chapter on the practice of the prize court.

ch. 70. They are only to be in force during the war; and the king's proclamation, directing the mode of distribution of prize money as to France, bears date 17th of April, 1793; and as to Holland and Spain, 25th November, 1795, and 25th of January, 1797.

The proclamation, which is given in the Appendix, directs only as to king's ships the mode of distribution, leaving the crews of privateers to divide as may be agreed among themselves and with their owners.

Besides the property in the capture given by the prize acts, they hold out other encouragements, viz. head-money, and sometimes gun-money. By the prize acts, in the present war five pounds a head is given to the captors for every person on board the prize.

And by 14 Geo. II. ch. 38. the widow of a volunteer seaman killed or drowned in the service is entitled to a bounty equal to one year's amount of his pay.

These prize acts being temporary and expiring with each war, it may seem less necessary to give the substance of them, or of the last, containing that of all the rest; but it must be recollected, that as the variations between them are small, so it is very certain that they will, in any future war, be revived nearly, probably exactly, in the same form, and so may be considered as having a certain perpetuity.

Of all these prize acts it has been observed(29), that they are of modern date, and form a very small part of the law of the admiralty, and that they were drawn up principally for the direction of the vice-admiralty courts, to which a jurisdiction in questions of prize was thereby for the first time given; that though the admiralty has not a jurisdiction inconsistent with these statutes yet they are but affirmative acts, leaving every matter, not therein specially provided for, as it was before.

Certain it is, that the prize acts have looked particularly to the vice-admiralty courts in the West Indies, in which, from their remoteness and other causes, great delays and abuses have happened; and, therefore, as we have seen, those courts have been entirely new-modelled and put under new regulations by a late act, 41 Geo. III. ch. 96. and in the prize acts themselves, their fees are limited, their delays punished with pecuniary mulcts of five hundred pounds, and the king enabled to regulate them at pleasure.

There are cases to which these prize acts do not apply, as for instance, to a *joint* capture both by the army and navy. The prize acts were only meant to attach on captures by ships; and the legislature accordingly adapted all the provisions of them to captures of that description, without

(29) 3 Term Reports, *Smart v. Wolf*.

extending them to a joint capture both by army and navy(30). This, therefore, is *casus omissus* in the prize acts, and doth not follow within their purview.

From hence it was attempted to set up the jurisdiction of the common law courts, even in matter of prize, in such cases as that just mentioned, and to prohibit the admiralty prize court where it was alleged to have put a wrong construction on the prize acts; and this notable attempt was made in the case of *Lord Camden v. Home*, 4 Term Reports, p. 382.

The prize acts usually give to the navy the interest in prizes taken by them, to be divided in such proportion as the king by his proclamation shall direct. The Dutch prize act, 21 Geo. III. ch. 15. had done so. The king and council rightly thought that there might be a capture by the king's ships which would not come within this act; for being a grant of the king's interest, it ought not to be extended further than the literal import of the words: they therefore gave to the officers who were sent on an expedition to the Cape of Good Hope(31), secret instructions (in order to prevent any contest concerning the dis-

(30) Even the case of a joint capture by a king's ship and a privateer, in some of the prize acts, has been excepted, and the property not vested in the captors, but remains in the king.

(31) General Meadows and Commodore Johnstone.  
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tribution of the prizes to be taken at the Cape by the joint operation of the army and navy), that such prizes should be divided between the land and sea forces in two shares, to be afterwards subdivided in certain proportions, this being the usual practice, and when no such instructions are given, the army and navy having commonly entered into an agreement, as to the several proportions which each should take.

The fleet having on board land forces took a ship as prize. The navy insisted that it was a sole capture by them, within the meaning of the prize act, and that the troops had only a right to share as passengers. A suit was instituted, and sentence obtained in the admiralty court, that the ship should be condemned as lawful prize by the squadron. An agent was appointed for the navy, who sold the prize ship and cargo, and distributed part of the proceeds. On an appeal, the lords commissioners pronounced that it was a prize by the conjoint operation of the army and navy, and the property vested not in the captors but the king, and monished the agent of the navy personally to account for the ship and cargo, and bring in the proceeds in his hands, possession, or power.

It was contended, that the common law courts, had a right to interfere by the prize act in question, because, by their general superintending jurisdiction, they have a right to construe all acts of parliament, and to confine inferior jurisdictions to right constructions; or, in other words, that

since the prize acts were passed, the courts of common law acquired a jurisdiction over all questions of prize within the scope of those acts, although no mention is made in any of them of any such new jurisdiction being intended to be given.

But it was determined, that the prize courts and courts of lords commissioners of appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the prize acts : and if they pronounce sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or propriety of it, even though perhaps they would have put a different construction on the prize acts. And the same courts have power to enforce their decrees. Therefore, where the lords commissioners had issued a monition after sentence to a navy agent, employed by persons supposed to be entitled to the prize, requiring him to bring the produce of it into court, to be distributed among the persons declared to be entitled by their sentence, this court refused to grant a prohibition.

It will not be irrelative here to add some account of the mode of payment of wages, and of prize money in the king's service.

The method of payment of wages to sailors in the king's service doth not come within the verge of the prize court ; but as it is connected with the matter of prize, as it is marked out by the prize

acts which we have mentioned, and as an analysis of it will be very useful, I will venture to insert it here, to save the trouble of a distinct chapter. The prize court, as we have just seen(32), doth so far intermeddle as to prize-money as to decree, in some cases, an account and proceeds to be brought in, and distribution to be made according to his majesty's instructions(33).

The mode of payment of wages in the king's service, and of prize-money, is marked out by several acts of parliament, of which the substance shall be here given, particularly of that on which the later acts are a superstructure, the 31st Geo. II. ch. 10. and which repealed all the former acts, and that of 32 Geo. III. ch. 33 and 67; and 35 Geo. III. ch. 28.

By these acts, when any of the ships of his majesty have been in sea pay twelve months or more, if such ship arrive in Great Britain, the wages of all such ships are to be cleared off, except the last six months; and when they are laid up, all wages are to be entirely paid off within two months after the ship's arrival, in the port where she is to be laid up.

The captain is to make out five complete pay-books immediately, and to send them to the commissioners of the navy at their board. The commissioners of the navy are to solicit a sum of money

(32) Even as to head-money, in a late case

(33) In Lord Camden v. Home.

sufficient to pay the wages, and as soon as it be issued to them, to cause immediate payment to be made of all the wages due(34).

If any officer, seaman, or marine, was absent on leave, when the ship was paid off, upon any detached service or having been taken or cast away, and make application for his wages in person, or through his commander, to the commissioners of the navy at their board, or to one of them resident at any port, the ship's books are to be sent where he is, and the wages paid. If ship not paid off, tickets given him till she is.

If he be discharged, he gets a certificate from the commander, on producing which, and being identified by an officer of his ship, he gets his wages in like manner.

If taken or cast away, he must enter on board a king's ship again in reasonable time, unless he has sufficient excuse, otherwise his wages will not be paid.

If marked as running away, he can get no wages till the mark be taken off.

(34) If the ship arrives in any port of Great Britain where there is a commissioner of the navy, he solicits a sum to pay the wages, and pays them. It must be observed, that since the mutiny at the Nore, an act was passed, 37 Geo. III. ch. 53. reciting an order of council, dated 3d of May, 1797, for an increase of pay to seamen and marines, enacting, that all wounded persons should receive full pay till healed or pensioned, and that the allowances of provisions on board ships of war should be full, without leakage or waste.

If removed from one ship to another, he receives a remove ticket for the wages due, payable at any of the pay-offices in London, Portsmouth, Plymouth, or Chatham.

If discharged as unserviceable(35), or sent sick into an hospital, he receives from his commander a ticket, and so from the hospital when discharged from thence, on which he will be paid at the pay-offices aforesaid; or if at any other port, he will apply to the officers of the customs, who forwarding his ticket to the commissioners of the navy, will get from them a bill for the amount of his wages.

If he die on board, a dead ticket is transmitted to the commissioners of the navy, who are to assign it for payment in one month to his representatives.

If officers or sailors wish to transmit part of their wages to their relations, on application to the commissioners of the navy, they send them remittance bills, and duplicates thereof, as the case may be, to the treasurer of the navy in London, clerk of the cheque at the great dock-yards, receiver-general of the land-tax, or officers of the customs, who pay accordingly.

Receivers of seamens wages must not take any fee above sixpence in the pound, on pain of fifty

(35) If discharged as unserviceable abroad, they are to be subsisted by the consuls, &c. at ninepence per diem, and sent home as soon as may be, by 32 Geo. III. ch. 33.

pounds; and the *bodies* of inferior officers, seamen, and marines, cannot be taken for debt, unless contracted before they entered the navy, and exceeding twenty pounds.

No ecclesiastical court or proctor is to take more than the fees mentioned in these acts, under penalty of fifty pounds for each offence.

Any inferior officer, seaman, or marine, who shall be desirous to execute a will, or a power of attorney, and shall at that time belong to any ship, must execute the same on board of such ship, unless he should be at sick quarters.

If made on board, it must be attested by the commanding officer, and one other signing officer belonging to the ship, and must specify the number at which the maker stands rated upon the ship's books; if at sick quarters, it must be attested by the agent, and must specify his number.

If he shall have been discharged the service, and shall be within the bills of mortality of the cities of London and Westminster, his will or power must be attested before the inspector, or his assistant, at the navy pay-office in London.

If he shall be at Portsmouth, Plymouth, or Chatham, or within seven miles of either of these places, his power must be attested by a clerk of the treasurer of the navy at such place.

If he shall be at any other place in Great Britain or Ireland, his will, or power of attorney, must be attested by the minister and two churchwardens,

or two elders of the parish where he shall be at the time of executing the same.

All wills and powers of attorney made by inferior officers, seamen, or marines, must contain the full description of the residence, profession, or business of the person who shall be therein appointed attorney or executor, and also the name of the ship to which such officers, seamen, or marines last belonged; and if made on board, or at sick quarters, the number at which their names stood on their respective ship's books. Every letter of attorney must be declared in the body thereof to be revocable.

If a will has been made, the executors must send it to the inspector of wills in London; and if the sailor died intestate, the person claiming administration must send a note to the inspector, stating the name of the deceased, that he has heard of his death, and the name of the ship. The inspector then sends to him two certificates, one to be signed by him and two inhabitants of the parish where he lives, certifying their knowledge of him, and belief of the fact; the other by the minister and churchwardens, to the character of those two inhabitants. These must be sent to the treasurer or paymaster of the navy, who makes out a certificate, and gives leave to obtain probate or administration; and a commission issues to the minister and churchwardens to swear the party, which being returned executed, a bill issues to

the same persons mentioned above in the case of living sailors, to pay the wages.

If the wages due are under ten pounds, the method of getting them is by the act shortened and rendered less expensive.

Whoever willingly and knowingly shall personate or falsely assume the name or character of, or procure any others to personate, or falsely to assume the name or character of any officer, seaman, or other person entitled to wages, pay, allowances, or prize-money, for service done on board of any ship of the royal navy, or of the executor, administrator, wife, relation, or creditor of any such officer, seaman, or other person, in order to receive any wages, pay, allowances, or prize-money; or shall forge or counterfeit, or procure to be forged or counterfeited, any letter of attorney, or other power or authority whatsoever, in order to receive any wages, pay, allowances, or prize-money; or shall willingly and knowingly take a false oath, or procure a false oath to be taken, to obtain the probate of a will or letters of administration, in order to receive any wages, pay, allowance, or prize-money, shall be guilty of felony and suffer death; and whoever knowingly shall forge or counterfeit any certificate of discharge, or certificate of servitude, in order to entitle them to recover their own wages, or assist in so doing, shall be punished as in cases of perjury.

It is to be observed, that some of the provisions above mentioned, particularly with respect to re-

mittances of pay and prize-money, have been by late acts extended to principal and commissioned officers of the navy, and also to the marine forces. See 35 Geo. III. ch. 28 and ch. 95.

By another late act, 25 Geo. III. ch. 31, the duty of the treasurer of the navy, when he presents memorials to the treasury for navy services, and prays that they may issue money to the bank of England on his account, and in many other particulars, is specially regulated.

In Ireland, it is provided(36) by statute, that all clauses in English or British acts, equally concerning their seamen and ours, are to be executed here according to their present tenor, save so far as the same have been altered or repealed. And by a subsequent statute(37), the remittance of the wages of seamen employed in the navy is facilitated; many provisions similar to those in the English acts already mentioned are enacted; and ample directions given to seamen and their relations, and to the out-pensioners of Greenwich hospital, with respect to obtaining the sums due to them, upon producing proper certificates to the collectors of the customs in that kingdom, whose revenue is reimbursed by the treasurer of the navy in England, and these repayments received in the Irish treasury.

(36) Irish statute, 21 and 22 Geo. III. ch. 48.

(37) 33 Geo. III. ch. 23. Irish.

## CHAPTER VII.

## ON THE LAW OF THE PRIZE COURT.

WHEN treating of the admiralty law in general, it was observed, that on the subject of prize, little or no light can be derived from the ancient marine ordinances of Europe, they seldom appearing to have had this matter in contemplation, and scarcely affording a document on this subject, save two small chapters in the *Consolato del Mare*(1). Here then we must launch forth into the depths of the law of nations, which afford such infinite and curious matter for research, that the elementary writer may well be alarmed, who attempts to draw a chart of so boundless an ocean. To touch upon all the questions of prize which occur in modern war, would require immense volumes, and therefore I have not been able to point out for myself any other line, in so confined a treatise as this, but that of

(1) Lately republished, in an handsome form, among the very useful and learned labours of Dr. Robinson.

selecting certain of the most frequent and important questions relating to captures at sea, and shewing the application of the law of nations to them, either purely in itself, or as modified by the customs, usages, and statutes of England.—A plan not dissimilar to that of the celebrated Bynkershoek, who, seemingly deterred by the view of the same vast ocean, though with incomparably greater powers to encounter it, selected for consideration only those *quæstiones publici juris* which are most frequently agitated.

The great questions therefore of prize, or connected with prize, of which I shall treat, are the following :

1. Of legitimate war.
2. Of the immediate effects of war denounced.
3. What is liable to capture.
4. When things moveable, and particularly ships, become the property of the captors.
5. Of ransom.
6. Who are the captors.
7. Of recapture and salvage.
8. What is a legal capture as against the captured ; which question can only arise as to neutrals.
9. On the rights and duties of neutrals.
19. On the principles of the armed neutrality.
11. Of the principles adopted by Britain respecting neutral commerce.
12. Of enemies goods found in the ships of friends.

13. Of the goods of friends found on board enemies ships.

14. Of contraband.

15. Of blockaded ports.

16. Of the right of search.

17. Of the proofs of enemies property.

18. Of competent courts of prize.

19. Of reprisals.

20. Of privateers.

21. Of the rights of neutrals.

#### OF LEGITIMATE WAR.

Vattel requires to a legitimate or lawful war, these three things. 1st. Just cause of complaint. 2dly. Denial of satisfaction. 3dly. A mature determination of the government, that it is for the good of the nation. But it is not my intention here to go at large into the grounds of lawful war laid down by moralists, but to confine myself to the one question, whether a declaration of war be required by the law of nations?

It has been generally supposed, that to a legitimate war, a previous proclamation, or declaration of hostilities, or sending *fecial* heralds to the enemy, was necessary; and this opinion hath been confirmed by frequent practice, both in ancient and modern times(2).

(2) In the instances of our wars since the revolution, that of King William with France was preceded by a solemn declaration, 7th of May, 1689; that of Queen

But as Britain and other European States have repeatedly failed to observe this ceremonial, we are called on to enquire whether their honour has been affected by this omission.

Grotius and Puffendorff admit, that a regular denunciation of war is not required by the law of nature; but they say it is by the *jus gentium*(3); and Grotius even pretends that the *jus acquirendi* is so peculiar to a *solemn* war, that it has no force in others, as e. g. in civil wars, in which points he has been fully refuted by Burlamaqui. Heineccius seems to favour the necessity of a solemn denunciation in his *Prælections* on Grotius.

Thomasius, followed by Bynkershoek, doth not allow that it is more than a matter of courtesy; and to use their phrase, both refer it *ad sola officia humanitatis*. They ask what rights of war are affected or altered by its adoption or its omission; and insist, that though it may be proper or advisable, it is not necessary. The war may com-

Anne by the same, 4th of May, 1702; the Spanish war in 1719, by the same; but in that of 1739, actual hostilities were committed before any declaration; and so in 1756, when thousands of French seamen in our ports were seized by surprize, and their navy thus crippled during the war. So also in 1778.

(3) Bynkershoek saith, that Grotius did not so much treat of an *universal jus gentium*, as of the customs and usages of certain European nations, which do not constitute a *jus gentium*. Quæst. Jur. pub. Lib. 2.

mence either by an actual declaration, or by open hostilities, or by a demand and refusal of justice; and no solemn proclamation can be required, except by express convention between nations, which doth not exist.

What solemnities, saith the eminent Dutch jurist, doth reason require, more than to demand, in a friendly manner, restitution of plunder and compensation for injury(4)? Nay, even this friendly requisition of justice is not indispensably necessary, for what forbids us to repel force by force? It may be a proof of magnanimity to give previous warning of intended force, but it is not a duty. The Romans and Achæans did it, but Polybius esteems it their peculiar glory. The Jews, the Macedonians, the whole of Greece, Achaia excepted, had not this usage; nor was the legality of war, the justice of enjoying the fruits of victory, or the strength of subsequent treaties, ever doubted on that account. He proceeds to give many instances of modern wars commenced and carried on without any formal previous denunciation. That of Gustavus Adolphus—of the Spaniards with the Dutch, when

(4) *Quæstiones publici juris*, cap. 2. Vattel insists, that in an offensive war a declaration is necessary, though not in a defensive, book 3. ch. 4. Grotius says, that though it is not always required by the law of nature, it is by the *jus gentium*, to produce the effects of impunity and of lawful capture, at least on one side Barbeyrac denies this. Burlamaqui supports Grotius.

the republic was liberated—of the English and Dutch in the reign of Charles II.—of the French and Spaniards in the reign of Lewis XIV.

On a similar principle it has been lately ruled(5), that actual hostilities are not merely to be reckoned from the date of a declaration of war. That where the state and conduct of a country has been for a considerable time ambiguous, the character of that country, during the whole of that doubtful state of affairs, is to be considered as hostile, and the property seized during that time to be treated as hostile; and that although a declaration of hostilities might make this difference, if followed by the usual acts and proclamation, that it might vest the right to the capture in the individual captors instead of the crown; this is a domestic regulation only, and makes no difference with respect to the admission of claims made by former foreign owners.

So on the breaking out, not of war, but of that ambiguous situation into which the conduct of France had put other countries, when Holland became exposed to French invasion, and Dutch ships therefore detained in our ports(6), the declaration of hostilities which followed acted on those seizures(7) with retrospective operation.

(5) See 1 Robinson, p. 117.

(6) See the case of the *Gertruyda*, 2 Robinson, p. 211.

(7) This would rather infer, that a declaration acting retrospectively, as well as in future, was necessary. See

I proceed to consider the immediate effects of the war denounced either expressly or impliedly; not all the effects of the war, nor the whole extent of the powers of the victor, but such only as come within the view and design of the present treatise.

*Of the Immediate Effects of War Denounced.*

The immediate effects to which I allude, and which here claim our notice, relate to commerce with the enemy, and to his property being in our ports at the commencement of the war.

Ex natura belli commercia inter hostes cessare, says Bynkershoek(8); and adds, quamvis nulla sit specialis commerciorum prohibitio, ipso tamen jure belli commercia vetita sunt; a principle recognized with us in a very late case(9), in which it was held, that trading with an enemy without the king's licence was illegal, and the property condemnable as prize, (exclusive of any positive act of parliament) and therefore illegal for a subject to bring, even in a neutral ship, goods from

the state of Russia with respect to Holland, 1 Robinson, p. 30. where the court said, Russia could not be considered as neutral from its hostile acts to Holland as an auxiliary of Britain; yet it would not say that Russia was at war with Holland, no declaration having formally announced it.

(8) Quæst. Jur. pub. cap. 7.

(9) Potts v. Bell, in error, 40 Geo. III.

an enemy's port purchased by his agent there resident, after hostilities commenced, though it might not appear that they were purchased of an enemy.

By the law of nations, all property of the enemy found in our territories at the commencement of hostilities is seizable, and even the debts due to him are claimable by the crown; but if not claimed during the war, the right to them revives with the peace; and these appear to be the rules adopted by England(10).

Notice in the Gazette of preliminaries of peace having been signed, is sufficient notice to all commissioned ships, without any special orders from the admiralty, according to the best opinions in 1783.

*What is liable to Capture.*

This question is easily and shortly answered, since all things are liable to capture, both persons and property(11), though to things im-

(10) See ante the chapter of Droits: and see the treaties between England and Denmark, and between England and Spain in 1667. Upon a declaration of war or hostilities, saith Lord Mansfield, all ships of the enemy in our ports are detained and confiscated, if no agreement to the contrary, Douglas 593.

(11) See Heineccius, de nav. ob vet. mer. vec. commissis, sec. 9. and every other writer on political law without exception. In the case of mere reprisals indeed, ambassadors,

moveable, the word occupation is more properly applied. I leave to moralists the task of ascertaining the boundaries of the power acquired over the captive, his lands, or his goods; powers which will ever be regulated by the feelings of the warrior, and the manners of the age; and the execution and abuse of which the mild spirit of the Christian religion has wonderfully softened, whatever may be said by the foolish scoffer. It is rather my business here to enquire, when and to whom the captured property accrues?

*When Things moveable, and particularly Ships, become the Property of the Captor.*

In the enquiry as to what is the true rule upon this subject, we mean only the rule to which civilized nations, attending to just principles, ought to adhere; for in practice there is no uniform rule upon the subject. All nations agree in this, that a firm and secure possession is requisite to perfect and complete a capture; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice; it is with some the rule of immediate possession or occupa-

travellers, women and children, have been exempted from their effects; si naves & merces hostium sint, utræque impune capi possunt; hosti enim in hostem omnia licere rationi consentaneum est. Heineccius, ibid.

tion;—with others, the rule of pernoctation, and twenty-four hours possession(12);—with others, the rule of bringing *infra præsidia*(13);—while, lastly, others add, the necessity of an actual sentence of condemnation. Grotius says, *In mari naves & res aliæ tum demum captæ consentur cum in navalia aut portus ferantur.*—Lib. 3. ch. b. De Jure, B. & P.

To this rule, that the prize must be brought *infra præsidia hostium*, and there legally condemned, Britain adheres, and in my humble opinion with justice, because it is not reasonable that the owner's property should be divested out of him, while any chance of recovering it remains, which must be until it is carried *infra præsidia hostium*; and because, without a regular condemnation, it cannot legally appear that the capture, has not been made *piratice*, and from a friend instead of an enemy.

(12) The rule of twenty-four hours possession is the rule of Portugal, and it has been so ruled in French admiralities, 1 Robinson, p. 73. It has been indeed a very general rule throughout the continent of Europe; but now no purchaser any where thinks himself safe without a sentence of condemnation.

(13) The rule of *infra præsidia* is the rule of the Roman law. See Goss and Withers, Burrow; such at least it appears to be in the Digests; but in the Institutes it is said, *statim occupantium fiunt*. The present judge of the English admiralty has said, that the rule of *infra præsidia* is probably the true rule, 1 Robinson, 60; and Bynkershoek says, when the former owner has lost all hope of recovery, *quod eodem redit*.

That this is the rule adopted by Britain, has been recognized by Lord Mansfield, who has observed, that though some writers have held that *quæ ab hostibus capiuntur statim capientium sunt*; while others have said, from the Roman law, that the prize must be brought *infra præsidia*; and Grotius and many more have made twenty-four hours quiet possession the criterion; the English court of admiralty holds, that no property vests in the captor till sentence of condemnation as good and lawful prize(14).

It has been said by Albericus Gentilis, and repeated after him by Grotius, that England formerly adopted a different rule, that of twenty-four hours possession; and it has been alleged, that the rule now adopted by England is peculiar to herself. Both these positions are untrue. Sir Lionel Jenkins says(15), condemnation upon the enemy's possession for twenty-four hours, is a modern practice, not agreeable to the equity and gallantry of the old Imperial law; not the law of Spain, nor of France, though ordinances have been made there to that purpose, but not

(14) 2 Burrow, 683, in Goss and Withers. Lord Mansfield's words as to Grotius are, the writers whom Grotius follows, and many more who follow him, make twenty-four hours the criterion. Lord M. seems here in error, for Grotius doth not; but the bringing *infra præsidia* is his criterion, though he speaks of twenty-four hours as a *jus recentius*.

(15) 2d vol. 771.

ratified by any of their parliaments, and condemned by the usurpers in 1649; but whether they intended this as a novelty, or as an affirmance of the ancient custom of England, he doth not take upon himself to determine. As to the rule adopted by England, it agrees with the general practice of the law of nations, by which a sentence of condemnation is now deemed generally necessary, and a neutral purchaser in Europe, during war, always looks to the legal sentence of condemnation(16), as one of the title deeds of the ship, if he buys a prize vessel.

Bringing *infra præsidia hostium*, and a sentence of condemnation being necessary by our rule to the perfection of a capture, it will be asked, what court has the power to pass such sentence, and what is signified by bringing *infra præsidia*; for being in possession of the enemy for twenty-four hours, has by some been considered as being *infra præsidia*? To the last question we answer, that by *infra præsidia* is with us meant, some port of the enemy where she may be legally condemned without any risk of recapture before such condemnation(17). Being

(16) 1 Robinson, p. 139. *Non prius fisco acquiruntur capta, quam sententia lata sit.* Hein. de nav. ob. vet. mer. rec. comm. sec. 16. Old Jenkins, in his *Five Centuries*, case 224, says, that twenty-four was the rule of England.

(17) This certainly must be the meaning of Grotius, and of Sir W. Scott, when they say, that bringing *infra præsidia* is the true rule.

therefore amidst the enemies fleet, or even brought into a neutral port, is not being *infra præsidia*, for still there remains to the captured a chance of being retaken before the vessel arrives in the enemies country, and while there remains any possibility of recapture to a vessel yet uncondemned, she is not *infra præsidia* in the eyes of Britain.

The court condemning must be a court acting and exercising its functions in the belligerent country. If the court of admiralty of a neutral country assumed such a power, it would amount to a declaration of war. The coasts of that country could not be safely approached, it would be giving the enemy a new station of war, making the adjacent sea a scene of hostilities, and affording to him most unjustifiable aid(18). If, indeed, the vessel captured from us be coming into the port of the enemy's ally, she is as in his own port(19); and where other nations adopt a different rule, as to the time or requisites to a complete prize, Britain is sometimes forced in questions arising relative to their then claims or in-

(18) 'This was determined in the remarkable case of the *Flad Oyen*, in 1st Robinson's Reports, and in Havelock and Rockwood, Term Reports, 39 Geo. III. and this invalid condemnation never can be aided by any subsequent sentence of a court of prize in the enemies country, pretending to confirm it, so as to affect the original owner; for which see the case of the *Kierlighett*, 3 Robinson, 96.

(19) *Bynkershoek*, Q. J. P. cap. 5. and see the case of the *Christopher*, 2d Robinson.

terests, to adopt a rule of necessity, as shall be instanced and explained hereafter, under the head of salvage.

So far from a neutral power having a right to condemn, it has been held anciently, that it is bound to restore, to arrest the alleged prize, and give it back to the captured, who have a *jus postliminii*; and we find in Sir Leoline Jenkins's letters, that this question is seriously put to him by the crown, though by him answered in the negative. And we know that treaties between England and Portugal have engaged, that if a ship belonging to one country should be brought by its enemy into the ports of the other, then happening to be at peace, the neutral country shall be bound to seize that ship, and restore it to its ally. And certainly it is acknowledged, that if the vessel was taken in the neutral port, it ought to be restored, but not so by the law of nations if it be captured at sea, and merely brought in there(20).

It has been said that Britain, while she insists on this forbearance from condemnation of her ships in neutral ports, has availed herself of such condemnations of her enemies vessels at Lisbon and Leghorn; it is answered, that the validity of these condemnations has never been tried or decided; and besides, these ports, by special trea-

(20) *Si captæ naves portum gentis amicæ adire cogantur nullum jus postliminii. Amica gens factum pro jure accipere debet. Hein. de nav. ob. vet. mer. vec. comm. sec. 9.*

ties, had assumed particular characters, and came to be considered quasi British ports: and the British court of admiralty has refused to condemn a vessel lying in a neutral port(21).

The innovating French, of late years, attempted to go beyond any, either theory or practice, ever before heard of, by endeavouring to establish, by means of their consuls in foreign ports, courts of admiralty of their own in neutral countries. This attempt the American States, at an early period of the present war, spiritedly defeated; but it was more successful in the territories of the king of Denmark, such consulate courts having been erected at Bergen and Christiansand, in Norway, and most actively employed until the purchasers under their sentences were taught by the wise decisions of the British court of admiralty, that those sentences were futile, invalid, and absurd.

What has been said doth not extend to ships carried into the ports of an ally in the war, and there condemned, or while the ship is there, condemned in the captor's country; and therefore, in the present war, a sentence of condemnation at Bayonne, of a ship taken by the French and carried into St. Sebastian(22), and lying there at the time of the sentence, had been held valid;

(21) In the case of the *Herstelder*, 1 Robinson, 119.

(22) 2 Robinson, p. 209, case of the *Christopher*.

and this decision agrees with Bynkershoek's opinion. Qu. Jur. Pub. cap. 4.

Having stated the rule of Britain, it will not be amiss to mention the opinions of some of the most celebrated writers on this subject. Bynkershoek rightly distinguishes here between friends, confederates, and allies, between those who are strictly neutral and simply friends equally to both parties at war, without the additional bond of treaties, those who are united by treaties to one or both of the parties, and those who are allies in the war: of the last there can be no question that they are bound to restore the captured property of their allies brought into their ports: of the first, that they are not, for to take from one friend to give to another, only in equal degree of amity, is evidently an injury to the former; as to federates, he admits that their treaties may bind them to such a restoration<sup>(23)</sup>; but seems to hint, that he cannot well conceive how this can be done without something more than *damnum*, without *injury* to the party from whom his prey is taken, and to the State to which he belongs.

The other part of the question he deems of more difficulty, but resolves, that by the law of nations, the enemy may sell captured property in

(23) He mentions a treaty between the States General and Portugal, similar to that above stated between Portugal and England.

a neutral country, and the neutral permit it, the property of the former being free in such a country, and the latter being at liberty to assist our enemies, being neutral to them, so that it be not with warlike apparatus, nor the assistance extended to one more than the other; and thinks that any pact to the contrary, such as that between Holland and England, in 1662, is a special pact, and an exception(24).

Vattell supports him(25); a privateer, says he, may carry his prize into a neutral port and sell it, though he would not be allowed to put his prisoners on shore in order to confine them.

Both authors evidently suppose that the property is already completely vested in the enemy, without saying a word of condemnation, the very supposition which England disallows.

To make a perfect and legal prize, it is also necessary that it should not be made in any neutral port or country, nor even within shot of the cannon of a neutral fortress.

The capture may be made either by king's ships, by privateers armed with letters of marque or commissions, by merchantmen furnished with letters of marque, or by vessels altogether uncommissioned; but all these latter species of capturing, with their respective rights and powers, shall be considered hereafter.

At present the question before us is, *when* a capture becomes complete? to which the answer

(24) *Quæst. juris publici*, cap. 15.

(25) *Book 3.*

made by Britain appears to be, when it is past all hopes of recovery, carried *infra præsidia*, and there condemned by a court legally authorized.

Such a court must, in determining that a capture is legal, be governed by certain principles, to unfold which this might seem the proper occasion ; but as they lead us into the vast and extensive field of the duties and rights of neutrals, I have thought it more expedient to postpone that question ; and, supposing for the present the capture to be legal and complete, to consider the power of ransoming the capture thus legally made, who are the captors that might thus claim a power of ransoming, and what is the law of recaptures.

### *Of Ransom.*

The custom of ransoming appears, from some regulations in the *Consolato del Mare*, to have been anciently practised. It then fell into disuse, and seems to have been revived in the seventeenth century : but the frauds which resulted therefrom, and the advantages thereby lost in weakening the enemy, have induced many maritime powers, and particularly France, and not long since Spain, to prohibit the offering and accepting such ransoms, and England has adopted the like prohibition.

By the 22d Geo. III. ch. 25, it is enacted, that it shall not be lawful for any subjects to ransom, or to enter into any contract for ransoming, any ship

belonging to any British subjects, or any goods on board the same, which shall be captured by the subjects of any state at war with his majesty, or by any persons committing hostilities against his subjects—

All contracts which shall be entered into, and all bills, notes, and other securities, which shall be given by any person for ransom of any such ship, or of any goods on board the same, shall be absolutely void—

If any person shall ransom, or enter into contract for ransoming, any such ship, or any goods on board the same, such person shall forfeit five hundred pounds; to be recovered, with full costs, by any person who shall sue by action of debt in any court of record in Westminster.

In Ireland a similar statute was passed in the 21st and 22d years of his present majesty's reign, chapter the 54th.

Before these statutes were made, it was held that the master might hypothecate the ship for his own redemption; and very curious questions arose, occasioning violent struggles between apparent humanity and apparent justice, for these qualities never can really come into contact, of which remarkable instances may be seen in *Yates v. Hall*, 1 Term Rep.; and in *Briggs v. the Perseverance*, Appendix to the present work.

By the prize act, a privateer taking ransom forfeits her commission or letters of marque, and her

commander is punishable with fine and imprisonment by the court of admiralty.

*Who are the Captors.*

Upon this subject, before the days of Grotius, much controversy had arisen. The modern interpreters of the Roman law finding therein the adage *capta capientium fieri*, held that primarily the immediate takers acquired a property in the capture, though the distribution was left to the discretion of their commander. This opinion Grotius labours to refute; though he admits, that states may, as they please, reserve the property to themselves, or give it to the captors: yet he insists that they have universally agreed, that such captured goods shall be considered in no other light than *res nullius*, which become the property, not always of the immediate occupants, but of those under whose power they are, or by whom they are paid or employed.

Even if enemies goods do become, by the law of nations, the property of him that takes them, yet the present practice of the most civil and puissant sovereignties of the world hath superseded this law; and the title to enemy's goods is vested in the prince, or governing power, and from thence derived as other *regalia* are(26).

(26) Quum Princeps sit, cujus auspiciis bellum geritur, idemque et sumtus et onera ferat, præda ipsi cedit.—Hein. De Nav. ob. vet. mer. vec. commissis. sec. 13.

One case is said to be excepted, that of a merchant ship, without commission, taking a ship which first assaults it. Bynkershoek holds that this capture belongs to the victorious crew, exclusive of every other claim; and it is said that the sovereign has no effective title; as the mariners acted under the primæval law of self-defence, paramount to all civil rights and constitutions, and needing no commission. This reasoning may be good as to pirates; but I see nothing to except the case from the general rule of captures, if it be from a legal enemy. However, this case is provided for by statute, dividing the spoil between the crew of the ship and the owners in the manner practised in private ships of war(27).

The right of the sovereign to all captures was acknowledged in France before the revolution; was always the law of England, according to the opinion of the privy-council declared a few years after the restoration(28); and, in Vattel's judgment, ought to be the law of all nations(29). The law of nations divests the right of the former owner, and then the municipal law vests it in the king(30). Conformably to Vattel's reasoning, indeed, this right or prerogative in the king ought to be con-

(27) Statute 22d and 23d Charles II. ch. 11.

(28) Sir L. Jenkins.

(29) Vattel, book 3. sec. 202.

(30) By the king or prince I always understand the governing power of the state, whatever its form may be.

sidered as a trust for the benefit of the nation. And such seem to have been the sentiments of the monarchs and parliaments of these countries in the eighteenth century ; for the legislature of Britain has generally, during that period, taken upon itself to grant to captors as their own property(31), after legal sentence of condemnation, all prizes made by king's ships, or privateers and letters of marque, but to be divided and apportioned, in the first case, in such shares and manner as his majesty by his royal proclamation(32) should appoint, which proclamation issues accordingly ; and in the latter, in such manner as shall be agreed upon among the parties.

The captors entitled under these acts and proclamations are not only those immediately engaged, but all vessels of the same or an allied nation near enough to strike terror into the enemy (33).

Cases of joint capture are, however, attended with much difficulty, as depending often on minute facts, and the decisions upon them have not been always uniform. Persons who do not actually take possession, but only contribute endeavours to that event, are captors not de facto, but

(31) See the prize acts.

(32) This proclamation in the present war, as to France, is dated 17th April, 1793.

(33) Molloy, book 1. ch. 2. sec. 22. 2 Leon. 182. 2 Robinson, p. 28. Douglas, 324. Sir L. Jenkins.

by construction, and the disposition of the court of admiralty is to narrow that construction. Thus in the case of the *Mars*, in 1760, quoted 2 Robinson, p. 22, a claim of joint capture was disallowed to ships not in company, but stationed at different outlets to catch the enemy. And the *Vestal*, detached from a part of the fleet on the coast of Holland, in 1798, to call in aid the whole body of the fleet, and give information to the admiralty, and thereby prevented from joining till two days after the engagement with *De Winter*, was not permitted to share. 2 Robinson, p. 16. The *onus probandi* lies on those setting up the construction; but joint chasing, or being in sight, is sufficient to entitle ships on captures at sea, provided the being in sight be at the commencement of the engagement, or afterwards during its continuance; in either of which cases, being detached on service during part of the time, shall not prejudice. Without these requisites, *common enterprize* is *not* sufficient. We speak of ships; for mere being in sight of a battle at sea, without a contribution of *actual* assistance, is not sufficient to support a claim of an army to share with sea forces (34). Claims on the part of *non-commissioned* joint captors have been admitted; but in a late case it was ruled, that private armed ships, such as transports, interposing in a service, if not associated

(34) See a claim of the army to share in the ships captured at Saldanha bay refused, 2 Robinson, 55.

and employed in a military capacity, were not entitled, and wearing a pennant is no conclusive proof thereof(35).

Grotius distinguishes between acts of hostility truly public, and private acts that are done upon occasion of a public war. By the latter, according to him, persons acquire to themselves, principally and directly, what they take from the enemy—whereas, by the former, every thing taken belongs to the whole body of the people, or to the sovereign. This distinction Burlamaqui justly condemns; for the war being derived from public authority, whatever right individuals have to things taken from the enemy must be derived from thence also. The right of war is in the sovereign alone, and all things taken are originally acquired to him, in whose hands soever; and therefore England considers prizes, whether taken by letters of marque or king's ships, equally belonging to the state, till granted to the captors.

#### *Of Recapture and Salvage.*

To understand this subject, it is previously necessary rightly to comprehend the notion of the *Jus Postliminii*. The Roman definition of it was given when treating of the civil law(36). I shall

(35) 2 Robinson, 274.

(36) See ante the chapter on the relation between father and son.

here give Vattel's, which is, *that right in virtue of which things taken by the enemy are restored to their former state, when coming again under the power of the nation to which they belonged.*

This right is the subject of a remarkable chapter in the 49th book of the Pandects, entitled *De Captivis, et De Postliminio*. The doctrine there laid down differs from that of modern times; for the Romans considered this right as extending not only to persons and lands, which do not at present claim our attention, but also to certain moveables(37), as to ships of war and merchantmen, though not to fishing or pleasure-boats(38).

In the practice of the modern law of nations, however, all moveables or booty are excepted from the right of postliminium, not but that by nature goods of all kinds are recoverable by this right; but from the difficulty of knowing moveables again, and the endless disputes which would spring from the re-vindication of them, this exception has arisen; and also because when such effects are taken by an enemy, and carried into a place of safety, the owner, from the little hopes of recovering them, is supposed to have relinquished and given them up. If, therefore, they are retaken *immediately*

(37) With these exceptions their rule was like ours. *Si quid bello captum est, in præda est, non postliminio reddit. Labeo. in cap. ff. De Captivis & Postliminio.*

(38) *Navibus longis atque onerariis, postliminium est, non piscatoriis, aut voluptatis causa, ff. 49. 15. 2.*

after the seizure, Vattel(39) says that the right of postliminium doth apply(40), because then it is neither difficult to know them again, nor can the proprietor be supposed to have relinquished.

The opinion of Vattel doth not differ from that of Bynkershoek. "If," saith the latter, "the moveable is become the property of the enemy pleno jure(41), and is afterwards retaken, it belongs to the retaker; if not, it returns to its former owner, he paying salvage(42). And no length of time since the capture, nor bringing of the prize into a neutral port, makes it a perfect prize; it must, say the foreign jurists, be brought into a port of the enemy, or of one of his allies in the war, and there, say Britain and most European nations, regularly condemned."

This then has been considered in modern times as the universal rule of the law of nations, that moveables recaptured are to be restored to the first proprietor on salvage, unless the captor has be-

(39) Book 3. ch. 14. sec. 209.

(40) Vattel is here incorrect: they go back to the owner, because never perfect and complete prize. Postliminy cannot apply to incomplete prize. "Suavis hic sermo de postliminio," says Bynkershoek, "nam qui sciunt quod postliminium sit, sciunt quoque, non esse nisi ejus, quod in hostium dominum ante transierat."

(41) When it doth so has been already considered.

(42) Bynkershoek on the question, *Res mobiles, & præsertim naves, an quousque recuperatori cedant?*

come full proprietor of the prize; and this rule *supposes* that the captor may become full proprietor of the prize, to the total extinction of the rights of the first proprietor. Now of the truth of this supposition many eminent authors have expressed their doubts(43), and one, who I believe is still living(44), decidedly denies it. He holds, that by the law of nations, though the proprietor cannot consider the taking away of his property by a legal enemy, or even the alienation of it to a third person(45), as an infraction of the law of nations, yet he never can lose his property therein; and that during the whole course of the war, he may, if he can, not only recover it from the enemy, which no one denies, but claim it from the hands of a third possessor; and this, whether that third possessor, being a foreigner, has obtained it by purchase, or being a compatriote by recapture, the first owner paying salvage to every recaptor.

(43) Puffendorf, Cocceius, Lyserus.

(44) Mr. Martens.

(45) The words of Mr. Martens here appear a little confused. He seems to admit a possessory right in the captor, though not a right of property. Now if he had a possessory right, he might cede that to the neutral vendee, who would then have a possessory defence, which he surely has not, unless where nations, like Britain, allow neutrals to purchase captured property legally condemned.

Whatever be the just principle in the abstract, upon this question whether a full property has been conveyed to the enemy by the capture; a question which never can (as Lord Mansfield has observed(46), arise but between the owner and a neutral purchaser, or between the owner and a recaptor); Britain has left no room for controversy on the subject, having repeatedly by her statutes ordained, that all recaptures, unless the vessel retaken has been set forth by the enemy as a ship of war, shall be restored on salvage; and that neutrals may legally purchase from the enemy, after a regular condemnation in the enemy's country, a liberty to neutrals which France denies.

Yet even here a question may arise of some importance. When Britain says, in its prize acts, (each intended to continue only during the existing war), that the captured property of her king's subjects shall be restored on salvage, doth she mean merely to declare the law of nations as at present interpreted, or by the enactment of a new law, to imply its deviation from that generally received? If the latter, then in the outset of a war, before a prize act passed, restitution might be by captors refused.

The statute restoring on salvage which demands our immediate consideration at the present period,

(46) 2 Burrow, 693.

is that of the 33 Geo. III. ch. 66. which enacts, that if any ship or vessel, or boat, taken as prize, or any goods therein, shall appear and be proved in any court of admiralty, having a right to take cognizance thereof, to have belonged to any of his majesty's subjects of Great Britain or Ireland, or any of the dominions and territories remaining and continuing under his Majesty's protection and obedience, which were before taken or surprized by any of his majesty's enemies, and at any time afterwards again surprized and retaken by any of his majesty's ships of war, or any privateer or other ship, vessel, or boat, under his majesty's protection and obedience, that then such ships, vessels, boats, and goods, and every such part and parts thereof as aforesaid, formerly belonging to such his majesty's subjects, shall in all cases (save in such as are thereafter excepted) be adjudged to be restored, and shall be, by decree of the said court of admiralty, accordingly restored to such former owner, or owners or proprietors, he or they paying for and in lieu of salvage (if retaken by any of his majesty's ships) one-eighth part of the true value of the ships, vessels, boats, and goods respectively so to be restored; which said salvage of one-eighth shall be answered and paid to the flag-officers, captains, officers, seamen, marines, and soldiers, in his majesty's said ship or ships of war, to be divided in such a manner as before in this act is directed touching the shares of prizes belonging to the flag-

officers, captains, officers, seamen, marines, and soldiers, where prizes are taken by any of his majesty's ships of war; and if retaken by any privateer, or other ship, vessel, or boat, one-sixth part of the true value of the said ships, vessels, boats, and goods, all which payments to be made to the owner or owners, officers and seamen, of such privateer, or other ship, vessel, or boat, shall be without any deductions, and shall be divided in such manner and proportions as shall have been agreed on by them as aforesaid; and in case such ship, vessel, or goods, shall have been retaken by the joint operation or means of one or more of his majesty's ships, and one or more private ship or ships, then the judge of the high court of admiralty, or other court, having cognizance thereof, shall order and adjudge such salvage to be paid to the recaptors, by the owner or owners of such retaken ship, vessel, or goods, as he shall, under the circumstances of the case, deem fit and reasonable, which salvage so to be adjudged, shall be accordingly paid by the owners of such retaken ship, vessel, or goods, to the agent of the re-captors, in such proportions as the said court shall adjudge; but if such ship or vessel so retaken shall appear to have been, after the taking of his majesty's enemies, by them set forth as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors, but shall, in all cases, whether retaken by any of his majesty's ships, or by any privateer,

be adjudged lawful prize for the benefit of the captors.

Before the prize laws were made, continuing the *jus postliminii* for ever, unless the ship retaken shall have been set forth by the enemy as a ship of war, and perhaps whenever these laws do not exist, the marine laws of England ordained, and do ordain, like the old marine law of most other nations, that the property was and is changed so as to bar an owner in favour of a vendee or recaptor, after bringing the ship *infra præsidia hostium*, and a regular sentence of condemnation there, though not before(47); and if so, these statutes concur with the abstract principle maintained by Mr. Martens. Britain also restores recaptures to friendly powers.

But though the rule above-mentioned be now adopted by Britain with respect to the recaptured ships, whose owners are his majesty's subjects, it doth not follow that she will adopt this rule as to ships recaptured, which had belonged to the subjects of foreign powers who have adopted a different rule. Here the rule of reciprocity prevails, and in whatever cases they have said that the recaptured property shall not be restored, Britain will do the same; and it has been laid down in

(47) A case before the statutes was decided against a vendee, after a long possession, two sales and several voyages, for want of a sentence of condemnation.

the English court of admiralty, that the proper rule for a State to apply to the recaptured property of its allies, is the rule of that country to which the recaptured property belongs(48); thus the law of Portugal, having formerly established twenty-four hours possession by the enemy to be a legal divestment of the property of an original owner, that rule was applied in a leading case(49) to a Portuguese vessel taken by the French, and retaken by English cruisers, after being a month in possession of the enemy, and the Portuguese claimant defeated in favour of the English recaptor—but when Portugal, in May 1797, relaxed from that severity, directed the restitution of the property of allies, and forbade the condemnation of British property recaptured, England adopted the same rule with respect to the recaptured property of Portugal.

The general adoption of this rule seems to make it unnecessary to go into all the distinctions which have been made by Mr. De Martens, in a late treatise on the subject of recaptures. He holds that a recapture of moveable(50) property belonging to our allies in a war, ought to be

(48) Sir William Scott, who approves this rule, as being both liberal and just, observes, that still it is not agreeable to the practice of nations, 1 Robinson, 611.

(49) *Case of the Santa Cruz*, 1 Robinson, p. 50.

(50) Under moveable things, the Jurists always include *res movetia*.

restored according to the same principles as are established with respect to our own fellow subjects, and so of the ships of a mere auxiliary (which he distinguishes from an ally) if they be part of the succours he sends us. That if two powers happen to be engaged in war with a third, but without any neutral concert or convention, (as the Turks and Holland were with Philip II. of Spain) neither is obliged to restore recaptures to the other, if the capture by the enemy was complete and perfect; and that as to perfect neutrals, if their ships were by the enemy legally confiscated, and sentence of condemnation pronounced, we are not obliged to restore them if recaptured; but if sentence has not yet been pronounced, or there was no solid motive(51) for stopping them, we are bound to restore them, as in the last instance the enemy himself would be.

All these questions become unnecessary if we have only to ask, what would the third power have done with respect to our ships in the like case, and under similar circumstances.

One case more only remains to be mentioned, that of a recapture recovered, e. g. a French ship captured by A. retaken by the French, and from

(51) Mr. De Martens conceives it a difficult question to determine what law is to decide on the *solidity of the motive* in the courts of the captors, or of the recaptors sovereign; but concludes, that it is to be decided by neither, but by the principles of the universal law of nations, and by treaties.

them recaptured by B. A question is here made by Mr. Martens to arise between the last recaptor and his countrymen the first captors; and that question he makes to depend upon another, whether the first captor had acquired a full property in the prize, and whether that had been divested by the enemies recapture? If he had not acquired full property, or having done so it was afterwards divested, he cannot claim restitution.

It appears then, that England having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of this rule(52) to its allies(53), until *it appears* that they act towards British property on a less liberal principle. I say, unless this *appears*, for Britain restores on salvage without enquiry, until it appears that the ally pursues a different rule, i. e. until this information is, as it were, forced upon the court. It did so with respect to Spain, until more accurate information

(52). The present learned judge of the admiralty has quoted from the manuscripts of Sir E. Simpson, the rule in his time, which appears to be the same; the rule is, saith he, that England restores on salvage, to its allies, but if instances can be given of British property retaken by them and condemned, the court, in their cases, follows their own rule.

(53) It is plain here that allies is not used in a strict, but in a general sense; not for allies in a war, but for friendly powers, States in amity.

with respect to the Spanish law compelled a change; it doth so with respect to America, Denmark, Sweden, and Hamburgh(54).

The salvage upon which Britain restores to its own subjects is, as we have seen, fixed by acts of parliament, to ships of war an eighth, to privateers a sixth(55). But with respect to the recaptured property of allies; here she again follows their own rule, and adopts a system of reciprocity. Thus the salvage which Portugal decrees, being one-eighth to ships of war, and one-fifth to privateers, while the marine law of England restores, in the latter case, on a payment of a sixth only, the rule of salvage which Portugal has established, is applied to her own vessels when restored in Britain(56).

We have hitherto considered recapture by vessels of war; but a ship may be recovered also, or rescued, by the insurrection of the prisoners on board of her, or by her being forced by stress of weather, or coming by any other accident into our ports.

In these cases also the vessel is restored on salvage, although they not being mentioned in the

(54) 1 Robinson, p. 65.

(55) The salvage to privateers was, by the old prize acts, made to depend on the time during which the prize had been in the hands of the enemy.

(56) Before the present war, it was not the custom of Britain to grant salvage at all on neutral property recaptured.

prize act, and the *jus postliminii* in strictness not applying to moveables, this seems rather to be an indulgence in practice, than a right.

In the case of rescue(57), we must distinguish whether it be of British property by British subjects, of foreign property by foreigners, or of foreign property by British seamen, or British property by foreigners. In all these cases the rescued property is restored on salvage; and in the first case, the rule adopted by the court in giving salvage is that of recapture; in the second, the power of the British court to hold plea of the demand has been questioned; it has been urged, that it would not hold plea of foreign seamens demands of wages; but a great authority has said, that salvage being a question of the *jus gentium*, and materially different from that of a mariner's contract, which is the creature of the particular institutions of each country, it saw no reason why such a claim should not be cognizable by the court; and the rule to be adopted is that of *quantum meruit*, and this has been accordingly done.

The cases last mentioned are the most rare; but one has happened in the instance of British seamen rescuing an American ship, and the court gave salvage at its discretion according to the merits; and declared, it would have given salvage

(57) See 2 Robinson, p. 271. the case of the *Two Friends*.

to American seamen rescuing British property, (58).

Rescue, though meritorious, is not a duty, but a voluntary act. Attempting to rescue, not from an enemy, but from a neutral, from whom the owner would have a right to claim costs and damages if the seizure and detention were unjustifiable) if the attempt be disappointed, is a breach of the law of nations, which endangers the ship and cargo though otherwise improperly detained.

Having stated what the present practice of England is as to salvage and recapture, it is but matter of curiosity to remark, that before the reign of King William England appears not to have restored on salvage, where the prize had been carried *infra præsidia* and condemned; that an act of parliament, in 1692, first enacted universal restoration as a positive law; and that the rate of salvage allowed to privateers formerly, varied according to the time that the prize recaptured had been in the hands of the enemy(59), which method was first deviated from in the American war.

The rules of other European nations with respect to recapture and salvage (of which our adopting the rule of reciprocity, makes the know-

(58) 2 Robinson, p. 280.

(59) See the Prize Acts in the 13th, 17th, and 29th Geo. II.

ledge necessary) are briefly these, as collected by Mr. De Martens.

Both France and Spain have ordained, that if a prize is recaptured before it has been twenty-four hours in the enemies hands, it shall be restored to the known proprietor, in consideration of one-third for the recapture; but that after that period, it shall belong wholly to the recaptor.

The maritime laws of most other countries in Europe adopt the same rule of twenty-four hours possession as conveying the captors, at least if followed by a sentence of condemnation, a full right of property; but the laws of some countries, particularly of the United Provinces, enforce restitution after a much longer period, indeed at any indefinite time, still proportioning the salvage to the time that the prize was in the enemies possession, which indeed our prize acts (as we have seen) formerly did as to captures by privateers.

When speaking of these regulations of the foreign naval codes, I must be understood to mean their application to recaptures of the property of the citizens of each State respectively, for as to neutral property they are industriously silent, except where conventions with particular nations have compelled explicit expression.

The provisions of these treaties on this head, may be found in the work of Mr. De Martens on recaptures.

*What is a legal Capture?*

As to the captor himself, singly considered, no capture is as to him legal, until it is so adjudged by a legal condemnation in a properly authorized court; and this court, as we have seen, must be a court of admiralty, or vice-admiralty, of the captor's country, or that of the allies in the war, and held within his sovereign's dominions, or those of his allies in the war, and not the court of a neutral power, nor any court held in neutral dominions.

The propriety of not suffering the captor to be judge in his own cause, nor to decide on the lawfulness of his alleged prize, is manifest(60). The justice of not referring the matter to a court in the captured's country, is almost equally evident.

As between the captor and captured, we have hitherto supposed every capture to be legal; though with respect to third persons, many questions have been touched upon as to their being complete, so as to divest the property of such third persons

(60) It is therefore by the prize acts ordained, that every ship taken, *after* lawful adjudication as lawful prize in the court of admiralty, and *not before*, shall belong to, and be divided among the captors as their proper goods and chattels. And in 4 Term Reports, 385, it is said, that in no instance can an adverse action be maintained at law for the proceeds of prize, until the demand has been liquidated by the sentence of a proper court of jurisdiction.

being original owners. But it is now time to inquire into the objections which may be made by the captured themselves, or the immediate possessors of the captured property, and these refer almost entirely to neutrals, for we can scarcely conceive any objection made by the enemy (all whose property is *prima facie* liable to seizure) to the legality of a capture(61), unless any particular species of property has been exempted by treaty, or convention express or implied, as has been sometimes done for the barks and boats of fishermen(62), or by safe conducts granted by our own sovereign(63). With respect to neutrals then the whole controversy must arise, and this leads us to the celebrated claims of the armed

(61) The absurd and Utopian scheme attempted by Hubner, Schlegel, &c. that war means military war, and commercial peace; that is, *that no private property can be the subject of prize*, appears to me not worthy of refutation or notice.

(62) Bynkershoek has a question, *an naves piscatoriæ etiam contineantur legibus nauticis*, 2 vol. 417. a. this privilege was allowed to the French fishermen in the present war, until it was found to be notoriously abused.

(63) Taking within cannon shot of neutral coasts, or in a neutral port, was formerly considered as cause of restitution, Bynkershoek, *Quæst. Jur. Pub.* cap. 8. Insult to the neutral power, and breach of the law of nations, doth not seem in modern practice to authorize the neutral (if he continues so after the insult) to restore the ship, much less the enemy to claim her from the captor.

neutrality, and to the wide and extended field of the rights and duties of neutrals in general.

*Of the Rights and Duties of Neutrals.*

We must begin by defining what is meant in this discussion by the word *neutrals*. I mean then those whom Bynkershoek calls *amici*, friends, or *non hostes*; and Grotius, *medii*, to distinguish them from *socii & fæderati*, allies and fæderates; and I cannot better express my meaning than in Bynkershoek's own words.

Non hostes appello, qui neutrarum partium sunt, nec ex fædere his vel illis quicquam debent: si quid debeant, fæderati sunt, non simpliciter amici(64).

In truth, it is obviously impossible in a general or abstract treatise, to discuss the rights and duties of fæderates depending on particular treaties, which must be as various as the provisions in those innumerable treaties, which form the express or written conventional law of the states of modern Europe. In laying down general principles, we can only speak of perfect neutrals(65).

(64) I call those neutrals who do not by treaty owe any thing to either party; for if they do, they are fæderates, or confederates, and not simply friends.

(65) The duties of fæderates in general, have employed the controversial pens of many famous Jurists. Bynkershoek thinks, that where two powers are at war with each other, a third power, equally and previously fæderated with each,

It is then the acknowledged duty of neutrals, *not to interfere in the war, and not to favour one party more than the other.* In this general rule all writers seem to agree, but when they descend to particulars, prodigious controversies arise between the advocates for the claims of neutral, and the defenders of the rights of belligerent powers.

We do not, say the Neutrals, interfere in the war, nor favour one party more than the other, when we carry on the commerce which we always did, and trade with each party as if there was no war between them. What is their war to us? Are we to consider the enemies of our friends necessarily as our enemies? We traded with them before the war, we will do so still. We would have been their carriers during the peace between you, if they had asked us. We are ready to be so still. We are ready to serve both parties with the same promptitude and zeal. We do not shew any favour to one, which is refused to the other. But are we to suffer in our rights because you chuse to go to war? Is our commerce to fail,—our sovereignty to be invaded—our commodities to remain unsold—and our people to starve, be-

and bound to furnish auxiliaries or assistance, should assist what it thinks the juster cause, but never embarrass itself with any engagement to either during the war. If they both are at war with a stranger, the fæderate is to assist each equally according to him.

cause you chuse to quarrel? Are you to strip us, in order to annoy your foes? No; we have a right to trade in war, as we traded in peace. We have a right to use our industry in whatever mode we think best, navigation is free, the sea is open, and our natural powers are not to be restrained.

Before we examine, say the Belligerents, your complicated assertions, part of which are false and part are true, permit us to clear out of the way a prefatory question! Do you really mean that no commerce with the enemy is prohibited by the law of nature and nations, and assert the universal legality of commerce with him, without any limit or exception?

No, replies the Neutral, I admit exceptions; for instance, it is prohibited to carry contraband of war, and to go to blockaded ports.

Though we do not see, say the Belligerents, how or why, consistently with the universality of your notions on the freedom of commerce, even these exceptions are made by you: yet, as we are so far agreed, we admit the concession, and proceed to examine the remainder of your positions.

You begin by wrongly supposing (as indeed the greater part of your doctrine is founded on false supposition, and formed of sophism) that we pretend to prevent your *usual* commerce *with* the enemy—no such thing—purchase from him what is wanting *for your own* consumption, or sell to

him your usual *peace supply* of articles. Increase your purchases to any amount in the belligerent countries, *provided* your own consumption requires it, and provided you remain domiciled in your own country. But if you begin to *carry* much more than your own occasions require, and than you did in time of peace—if you open a *carrying* trade which was then unknown, and extend the faculty of carrying for the belligerent, where he was in the habit of carrying for himself before to your exclusion; if you thus turn *carriers* for him; you are trading not *with* the enemy, but for him. You are doing that which he is not able to do for himself, and which he would neither ask nor permit you to do in time of peace. You enable him by these means to preserve his sources of revenue, and yet meet us with undiminished strength. Every man that you lend to his trade, enables him to furnish a man to his own hostile fleets. You enable him to come to the war with augmented strength, which he could not have had without your aid. You profess to be neuter, and you are giving to our foes the most powerful assistance, equivalent in its effects to furnishing him with the strongest military aid(66). Besides, what do

(66) See the most able, learned and ingenious work, lately published by Mr. Ward, on the rights and duties of neutrals, which doth him great honor. It is surprising that Mr. De Martens, though an Hanoverian subject of his majesty, should have published a work on the same subject, replete with every false principle.

you do more? You claim a right, and exercise it, of conducting and undertaking for the enemy, not only their carrying trade abroad, but their coasting trade at home. By extraordinary vigilance and exertions of wonderful labour, by means of fleets lying perpetually on their coasts, we have baffled their convoys going from one port to another at home, or from dock-yard to dock-yard, for the purposes of assisting and furnishing the naval equipments of their fleets, and have thereby retarded or prevented their projected expeditions to annoy us; and now you tell us, you will undertake this business for them; you will secure this intercourse so hostile to us, and that, provided it answers your own mercenary views, you regard not the consequences to us. To use the words of Vattel, book 3. ch. 7, a nation that, without any other motive than the prospect of gain, is employed in strengthening my enemy, without regarding how far I may suffer, is certainly far from being my friend, and gives me a right to consider and treat it as the associate of mine enemy.

As to saying (continue the advocates for the belligerents) that you do no injury because you favour both equally, it is a sophism(67). What

(67) It is a sophism, indeed, of modern invention. The great jurists of the last century totally disclaimed it. Grotius indeed says, that the neutral should favour the juster side; but Bynkershoek truly observing, that the justice of the cause is no business of the third power, and asking who made him a judge, in continuation makes this plain and

we ask of you is to assist *neither*, not to assist *both*. You cannot assist each equally, unless we were exactly on a par. Now at the time we complain, we happen to be superior. We do not want your assistance, the enemy doth; and if you had not furnished it, the enemy must have been brought to reason, and that war, the miseries of which you have prolonged, would have been terminated.

As to your *right* of trade with our adversary, we do not deny it, as far as it extends; but your claims go infinitely beyond your right. We also have a right, the right of security, against your strengthening the enemy. Where there is a conflict of rights, one can be inserted only, subject to the diminution occasioned by the other.

We do not therefore invade your sovereignty; we do not want to make your commerce less than it was before the war, to prevent your importations for your own use, or the sale of commodities not

sensible remark : “ Si medius sim, alteri non possum prodesse ut alteri noceam. Sed aies utrique mittam quicquid mihi videbitur, sed noli sic sapere, quin potius crede, amicorum nostrorum hostes bifariam esse considerandos, vel ut amicos nostros, vel ut amicorum nostrorum hostes, recte iis omnibus adesse licet ope, concilio, armis; quatenus autem amicorum nostrorum hostes sunt, id nobis facere non licet, quia sic alterum alteri in bello præferremus. Præstat cum utroque amicitiam conservare quam alteri in bello sapere, & sic alterius amicitie tacite renunciare.”——See Grotius, lib. 3. ch. 17. sec. 3; and Bynkershoek, Q. Jur. Publici, cap. 9. De statu belli inter non hostes.

contraband in places not blockaded. Your commerce, your manufactures, your people, your rights, remain just as they were before in time of peace, save and except as far as they counteract our evident rights. But you are not to profit(68) by our misfortunes and the calamities of war, by carrying on a *new* trade to our destruction.

Such is the general outline of this famous controversy, on the rights and duties of neutrals, between their partizans and those of the belligerent naval power, which is stronger in the war, for the weaker will for the time being pretend to adopt the reasoning of the neutral(69).

(68) Hubner doth not scruple to avow this principle of unworthy and unjustifiable gain. Neutrals, says he, cannot refuse to themselves so considerable an advantage; *i. e.* says Mr. Ward, as much as to say, the wars of others, instead of calling for all their sincere good offices for the redress of the injured party, or at least for the re-establishment of peace, are in truth the harvest of neutral powers, by making them the carriers of the weaker party.

(69) In this respect the French, certainly a weaker naval power than us, have been ridiculously inconsistent with themselves. In the reign of Francis the First, and for many years after, they held that enemies' goods in the ships of friends, and friends goods in the ships of enemies, were confiscable. In the present war, they attempted to confiscate all goods of British manufacture, though *bonâ fide* the property of neutrals. Yet they have since exclaimed, with the utmost vehemence, because the first only of the above principles, and the only one founded in truth and justice, has been by us adopted.

In this controversy, the advocates for the extent of the neutral claims are clearly wrong, if we are to judge by the law of nature and nations, by usage, or by recourse to the greatest authorities. If they rest upon convention, that can only affect the parties who enter into that convention.

My original design doth not oblige me, nor doth the compass of this work allow me, to support articulately, and at great length, the positions which have been just advanced; however, they shall be supported when we come more into detail.

Suffice it for the present to observe, that both the law of nature and nations hold the maxim, *Sic utere tuo ut alienum non lædas*: that the usage of nations, uninterrupted until the middle of the eighteenth century, about fifty years since, was directly opposite to the present claims of neutrals—and that these claims have been reprobated by Grotius, Bynkershoek, Heineccius, Valin, and Vattel, on the continent, added to many most able writers in Britain, and to the very high authority of the uncommonly eminent judge who now presides in the British court of admiralty supported by the greatest learning and strongest argument in repeated decisions.

Having thus stated the theory of the controversy, I proceed to its active effects on the nations of Europe.

*The Principles of the Armed Neutrality.*

The doctrines above stated, as being founded in nature and truth, were universally received by the nations of Europe, until the middle of the last century; indeed, so universally, that no doubt was ever started on the matter, nor mention made of any such controversy as has in our days disturbed the peace of Europe with contentions about the rights of neutral commerce. One claim, indeed, was set up by belligerent powers, much more adverse to the wishes of neutral states than any advanced in the present times, which was, that no neutral power should be allowed to carry on any trade or commerce whatsoever with the enemy, even in their own commodities, carried on their own account<sup>(70)</sup>, and not contraband.

This extravagant pretension in the belligerent to interdict all commerce whatsoever between neutrals and his antagonist, which was in the seventeenth century supported with great heat, and actually asserted by the English and Dutch as against France in the year 1689, has been long since relinquished by all nations, except as France herself in the present war shewed a disposition to adopt

(70) See Grotius, De Jur. Bell. lib. 3. 1. 5. who condemns the doctrine in its full extent, but admits it as far as relates to contraband of war, and even farther, if necessary, making in the last case compensation.

the spirit, by pretending to confiscate all British manufacture, although *bona fide* the property of neutrals. And it is an insinuation against Britain utterly unfounded, that she wishes to prevent and cut off the whole trade of neutral powers, or to render it nugatory, even when carried on for their own account.

But the pithy sentence, so captivating to vulgar ears, and so little understood(71), that free ships make free goods, was unheard of and unknown, until the late King of Prussia, usually termed Frederick the Great, attempted to introduce the novel maxim in the war of 1745; and his claims were set forth at large in a memorial from his minister, Mr. Michel, to the Duke of Newcastle, in the year 1752(72). Some Prussian vessels, under the profession of neutrality, had violated the law of nations, by giving the most obvious and unjustifiable assistance to our enemies. The courts of admiralty in England had passed sentences on their cargoes accordingly. The king of Prussia

(71) *Le Pavillon neutre couvre la merchandise. Vry schip, vry gud.* Every man versed in parliamentary business, as well as the members of the Corps Diplomatique, knows the magic of a terse or quaint expression floating among the vulgar, even though opposed to reason.

(72) Sir James Marriott has given us a curious anecdote: he says, that one great source of the Prussian resentment arose from a smart saying of Lord Granville (Carteret), that he had never heard of the flag of Berlin, and should as soon expect to hear of the flag of Frankfort.

put in a claim perfectly new, and, (as we shall shew hereafter, directly opposed to every principle of the law of nations, and even of the Roman law so much received and respected in Germany), to try the matter over again by a court of his own; which having, as may be supposed, decided in favour of his own subjects, he proceeded to execute its sentence, by taking upon himself of his own authority in the manner of reprisals, to cancel a large debt which he had incurred to private merchants in England for money lent to assist him in his wars, and which had been secured on his new conquests in Silesia.

This conduct, and the memorial above mentioned, entitled *Exposition des Motifs, &c.* produced the celebrated answer which doth so much honour to Britain, and which has been justly said to contain a thorough investigation and justification of the principles adhered to by the court of admiralty in England, in cases of capture of the ships and property of neutral powers in time of war, and it has ever since been received as the great standard and guide in matters of this nature(73). We shall not be surprised at its fame and authority, when we hear that it was composed by the united abilities of Lord Mansfield, then solicitor-general; Sir George Lee, then judge of the prerogative

(73) This answer is universally known, and is to be found in many books and collections; amongst others, in the *Collectanea Juridica*.

court; Doctor Paul, then advocate-general; and Sir Dudley Rider. All Europe coincided in acknowledging its truth. Montesquieu calls it *Reponse sans Replique*. The King of Prussia submitted to its cogency, and the interest of the Silesian loan was no longer with-held.

What then must be our surprize, when, in opposition to these well-known facts, we find Mr. Schlegel saying, that it was matter of astonishment that the English government and lawyers, instead of following the progress of information, should be more than a century behind in the knowledge of the law of nations, which he pretends had been altered by the Dutch at that period, to the principle that *le pavillon neutre couvre la merchandise*. This alteration, he says, they made, because, being then the carriers of Europe, they felt themselves more particularly interested in its adoption. How the Dutch could alter the law of nations, so as to affect other powers, who like Britain did not adopt the same alteration, he leaves totally inexplicable, and indeed it is absolute nonsense. In the mean time he it observed, that in stating it to be an alteration, he admits what the law of nations originally was, and still is, and from which Britain never has swerved. But of this more hereafter, when we come to consider the questions in detail.

The pretensions set up for the first time by the King of Prussia, though then by him abandoned, were never forgotten by the nations most accus-

tomed to the carrying trade, whose inordinate love of gain induced them, at a subsequent period, from these embryos to create more extensive claims, and to advance them with a firmer front, than that shewn in the modest queries of the Prussian minister, who rather asked for explanation, than asserted principle. These latter claims, which came to their full maturity in the year 1780, and which were then urged and insisted on by Russia, Denmark, and Sweden, may be reduced to the following heads.

1st. That all neutral ships may freely, and without controul, navigate from port to port, and on the coasts of nations at war, to whomsoever their cargo may belong.

2dly. That the ship covers the cargo, or free ships make free goods, i. e. that the effects belonging to the subjects of the warring powers, except contraband merchandize, shall be free in all neutral vessels.

Or these two propositions may be thus combined in one; that free ships make free goods, and therefore that neutrals have a right to coast from port to port, and to trade from colony to colony, and from the colonies to the mother country of belligerents, although carrying enemies' goods, without being liable to search and detention, except for contraband of war, or unless they are going to a blockaded port.

3dly. That contraband is confined to articles of exclusive and immediate service in war, or to

such as are declared to be contraband by treaties.

4thly. That no place shall be considered as blockaded, until it is surrounded in such a manner by hostile ships attacking it and keeping their places, that no person can enter into it without manifest danger.

5thly. That the courts of the capturing belligerent are not competent to entertain questions concerning neutrals captured or detained on the high seas.

6thly. That the right of search is not a natural right, and is confined to the inspection of papers.

7thly. That the flag of the State excludes all right of search whatsoever, and whatever is done under cover of it, excludes the jurisdiction of courts of prize, and becomes matter of representation between State and State.

8thly. That neutral vessels must not in any case, though without convoy, be stopped, except for just cause, and on clear evidence. That the process must always be uniform, prompt, and legal; and if loss be sustained, not only damages must be paid to the individual, but satisfaction be made to the State for the insult.

9thly. To the above positions, some modern Utopian writers have added the following; that war means military war, and commercial peace; that is, that no private property can be the subject of prize.

I should now proceed to the refutation of these extravagant, though in the view of ignorance or incaution, perhaps plausible claims, with the brevity suited to such a treatise as this, leaving their full and detailed refutation to the very able pens which have been, and are, still employed in exposing them; particularly that of Mr. Ward, who, in a celebrated work, (part of which has been published,) with incontrovertible force, argument, and weight of authorities, is busied in demolishing to the ground the visionary structure erected by Hubner and Schlegel. But I must first state what are the principles of Britain upon these subjects, that we may see the opposite propositions held by her in their full contrast, and the support of them will be the best and clearest mode of confuting her adversaries.

*The Principles adopted by Britain respecting  
Neutral Commerce.*

1st. That free ships do not make free goods; or, in other words, that the property of enemies found on board the ships of friends is confiscable; but this confiscation doth not extend to the carrying ship, which is even entitled to freight, except in certain excepted cases.

2d. That the goods of a friend (if lawful and not contraband) found on board an enemy's ship, are not seizable, but ought to be to him restored.

3d. That contraband goods going to the enemy, even though the property of friends, are seizable as prize, because they enable the enemy the better to carry on the war, the doing which is a departure from neutrality. And that contraband is not always, or exclusively confined to implements of war.

4th. That by carrying contraband, the freight and expences are forfeited, but not the ship, unless the contraband belongs to her owner, or there be some particular circumstances of aggravation.

5th. That neutral vessels breaking a blockade, are liable to confiscation, if conusant of the blockade either by notification or by fact, but not so as to their cargo, unless the owners of the cargo were conusant of the blockade; and that the accidental absence of the blockading force doth not remove a blockade.

6th. That the right of visiting and searching merchant ships upon the high seas, and not merely their papers but their cargoes, whatever be the ship, its cargo, or its destination, is an incontestible right of the lawfully commissioned cruisers of every belligerent nation.

7th. That the sovereign of the neutral country cannot, consistently with the law of nations, oppose this right of search.

8th. That the penalty of opposing this right of search, is the confiscation of the property so withheld from visitation.

9th. That on the breaking out of a war, it is the right of neutrals to carry on their accustomed trade, except in contraband articles, or except they go to places blockaded; but that the coasting and colonial trade of the enemy cannot be their accustomed trade.

10th. That though a maritime neutral power should strictly abstain from carrying the trade of a belligerent, or supplying him with contraband, yet if he opens his ports to his privateers for the purposes of hostile equipment, if he gives him shelter for his prizes, and lends him his courts, or suffers him to erect his own for the purposes of condemnation, this is a breach of neutrality and cause for war.

11th. That before a ship or goods captured can be disposed of by the captor, there must be a regular judicial proceeding for trying the legality of the prize, wherein both parties must be heard.

12th. That the proper and regular court for trying the legality of a prize, is the court of that State to which the captor belongs.

13th. That this court must judge by the law of nations and by treaties, and according to an established method of determination universally and immemorially received in the maritime law of nations.

But it will be necessary to go more at large into the sentiments of Britain on these subjects,

and into the examination of the justice of those sentiments on each specific question ; and first,

*Of Enemies Goods found in the Ships of Friends.*

The law of nature is the law of reason, and reason dictates that an enemies property may be taken wherever it can be found(74). It is not in the power of a third party, by his interposition, legally to protect it. If he could thus protect his goods, he might also his person and his lands, and thus render him invulnerable to me. But what is this but to depart from neutrality,—to become an avowed auxiliary of my adversary, and an open enemy of mine. If the neutral has fairly purchased the goods from my adversary for his own use and consumption, they are his and not the enemies, and I have no right to touch them ; no more than if he is carrying his own goods, not contraband, to sell to the enemy, have I a right to impede him. But if he is carrying for the enemy, I have a right to seize the enemy's property thus carried ; and to ask Britain to concede to a contrary doctrine, is to ask her to waive all common sense and to succumb to the will and

(74) A nation has a right to deprive the enemy of his possessions and goods ; of every thing which may augment his forces, and enable him to make war. Vattel, book 3. ch. 9 161. and that in neutral hands, book 3. ch. 7. sec. 507. Burlamaqui says the same thing. Political Law, book 4. ch. 7. So Grotius, Bynkershoek, and Heineccius, as shall be shewn presently.

power of her enemies, in order to gratify the avarice and love of gain which actuates nations pretendedly neutral.

These positions are supported by every great authority. Grotius, indeed, busily employed in considering a question now obsolete, viz, whether *all* commerce of neutrals with an enemy may be interdicted, scarcely touches upon this, because it was never suspected in his times, that the principle above asserted could admit of controversy; but his opinion is sufficiently clear, because in one of his own notes(75), he recites and adopts, without comment, the rule on this subject of the book styled *Consulatus Marus*; which, as he observes, says, that *Si navis sit pacem colentium, merces autem hostium, cogi posse ab his qui bellum gerunt navem ut merces eas in aliquem portum deferat, qui sit suarum partium*; and the same appears *a fortiori* from his not entirely negating the much stronger position advanced in the *Consolato del Mare*, that a neutral vessel shall not carry on *its own* trade with a belligerent.

We are strengthened then by the opinion of Grotius, who therein agreed with that celebrated more ancient authority the *Consolato del Mare*, and with an eminent author who lived not long before him, Albericus Gentilis.

(75) On the fourth section of the first chapter, third book, *De Jure belli & pacis*.

Mr. Ward has successfully shewn, that Puffendorf was of the same opinion; and Bynkershoek, in his questions of public law(76), treating of this very point, says; why do you doubt? since I have a right to seize whatever belongs to the enemy(77). I take that which is the enemies, and which by the right of war belongs to the victor; and adds, in another place, *quod omni jure licet, & perpetuo observatur.* :

The illustrious civilian Heineccius, a cotemporary of Bynkershoek (and mentioned by him as coinciding in opinion on this point) says in express terms: No one doubts that enemies property, found in the ships of friends, may be taken and seized, because one enemies power over the property of another his enemy, wherever he finds it, is uncontroled(78).

Vattell says, the effects belonging to an enemy found on board a neutral ship, are seizable by the rights of war; and Burlamaqui, when he says, that enemies goods found on board the ships of friends, if there put by consent of the owners,

(76) Ch. 14. De hostium rebus in amicorum navibus repertis.

(77) Quid dubitabis, cum recte occupem quicquid hostium est.

(78) De nav. ob. vec. Merc. Vetit. Comm. sec. 8. Res hostiles in navibus amicorum repertas capi posse nemo dubitat, quia hosti in res hostis omnia licet, catenus ut eas ubicunque repertas sibi possit vindicare.

may make the ship lawful prize, confirms the same opinion in its fullest extent.

These authorities are (79) again supported by numerous treaties, coming down to our times, stipulating for the exemption from seizure of enemies goods, on board the ships of the friendly stipulating party, as a favour and privilege, thereby shewing the consent of all the nations who have obtained such articles in treaties, i. e. of all the nations of Europe, that the general rule was as above stated : *exceptio probat regulam*.

When we consider these treaties and these authorities, and reflect that they come down almost to our own times, many of the treaties alluded to being made even in the eighteenth century, and Bynkershoek and Heineccius having flourished down to the middle of that century, and others of the eminent writers above mentioned, at a later period, what shall we say to the courage of Hubner and of Schlegel, insinuating that the law of Europe was altered in this respect by universal consent, about the middle of the seventeenth century ; and what must be our surprize when we find Mr. De Martens, a professor of the law of nations, on the foundation of his Britannic majesty at the university of Gottingen, (and whose authority is therefore much relied on by Schlegel) saying, that it is an established principle, and

(79) On the other hand, there are numerous treaties in which this exception is either not mentioned, or it is expressly stipulated that the privilege shall not be enjoyed.

has been so since the middle of the seventeenth century, that a neutral ship covers hostile cargo(80).

The contrary principle cannot admit of dispute; and, as Mr. Ward has truly observed, if the whole power of the rest of Europe were successful in obliging Britain to relinquish it, it would still be true, and still part of the original law of nations, abstracted from convention and treaty.

I proceed then to consider, the only consideration indeed which excited any doubt in the minds of the great Jurists above mentioned, what is the effect of the seizure of enemies property on board a neutral ship, upon the ship itself.

By the ancient laws of France, and of many other parts of Europe, the neutral ship which carried enemies goods was confiscated(81).

In the *Consolato del Mare*, it is held, that though the neutral vessel may be compelled to carry the enemies cargo to a place of safety, yet it must be paid the whole freight which would have been earned at the delivering port; which therefore plainly implies, that the vessel is not

(80) In a brief treatise purporting to state the rights and duties of neutrality, in which there are almost as many erroneous positions as there are lines, and scarcely one conformable to the true law of nations, as we shall see in our progress. From Gottingen surely opinions so hostile to Britain, and to the true law of nations, were not to be expected.

(81) See Bynkershoek, *Qu. Pub. Jur.* cap. 14.

confiscable ; and Grotius, in a note on his *Treatise de Jure Belli & Pacis*, confirms this opinion(82). But in another work, he has recourse to a distinction found in the *Digest*(83), between the goods being embarked with or without the knowledge of the master, holding that in the former case the ship is confiscated, in the latter not(84).

Bynkershoek(85) doth not agree entirely with any of the opinions hitherto mentioned as to the ship and freight. He sees no reason for the rule in the *Consolato*, that freight is to be paid to the neutral ship, because, saith he, the freight cannot be due when the merchandize doth not reach to its destined port ; and as to the distinction taken by Grotius from the Roman law, though he admits that *in iis quæ sola ratio commendat, a jure Romano ad jus gentium, tuta fit collectio* ; yet he insists that the maxim of Paulus relates only to smugglers and illicit trade, and though that prin-

(82) Lib. 3. c. 1. sec. 4.

(83) De *Publicanis & Vectigalibus*, by Paulus. But Heineccius insists, that this saying of Paulus is not rightly understood, and that the neutral has a right to take on board the enemies goods, and so has the belligerent to seize them. *Jure suo utuntur qui res ferunt, & etiam qui auferunt.*

(84) Quoted by Bynkershoek, cap. 14. Loccenius agrees with him.

(85) *Quæst. Jur. Pub.* cap. 14.

ciple justifies the confiscation of a ship for defrauding the revenue, or carrying *contraband* to the enemy, it doth not extend to the loading a neutral ship with a cargo belonging to the enemy, for that is licit(86).

Vattell contents himself with saying simply, that by the law of nature, the master is to be paid his freight, and not to suffer by the seizure; and Burlamaqui's words are, "Neither do the ships of friends become lawful prizes, though some of the enemies effects are found in them, *unless* it is done by consent of the owners, who by that means seem to violate the neutrality or friendship, and give us a just right to treat them as enemies(87)."

The rule of Britain(88) appears to adopt the most liberal extent that the most liberal of the writers above cited have allowed. It doth not con-

(86) This is not very clear. If it be licit, how then is the cargo seizable? It is, however, very intelligible, particularly in England, which allows him freight, though it takes the cargo, thereby admitting the trade was licit. But would it not be much more intelligible to say that the trade is illicit, the owner being conusant; and that the restoring his ship, and giving freight, are favours.

(87) Politic. Law, part 4. ch. 7. sec. 23.

(88) See the answer to the Exposition des Motifs, and the case of the Rebecca, 2 Robinson, p. 101. in that case it is said freight is given to the vessel employed in trade between the ports of different enemies, if *bona fide*.

fiscate the ship(89), and it even gives freight(90), if there are no false papers on board, nor refusal to shew them, or to be searched, or unless the neutral ship was employed in the enemies coasting trade, or between the ports of the mother country and a colony of the same, or of another enemy; or lastly, unless the goods be contraband.

The principle on which freight is refused in the coasting and colonial trade is, that these are not the *accustomed* trades of the neutral, but were before the war generally shut up to the exclusive use of the mother country(91).

(89) Si dolus apparet, nil Justius quam ut navis fisco vindicetur. Heineccius de nav. ob. vet. merc. vec. commis. sec. 12. It is said in Smart and Wolf, 3 Term Reports, p. 334, that formerly many Dutch neutral ships laden with the property of the enemy, were condemned without reserve, ship as well as cargo; see 1 H. Blackstone, p. 191.

(90) It is contended in the same case of Smart and Wolf, that the taking cognizance of freight, was a novel usurpation of the prize court; and that there was no instance of its having been awarded to neutral ships for the goods of enemies condemned before the American war; if so, the conduct of Britain, so far from being more harsh than formerly, has been relaxed. The objection to their taking cognizance of freight was totally unfounded; the common law could not, for it would involve the question of prize, contraband, &c. and so says Lord Kenyon.

(91) See the principles laid down by Sir W. Scott, in the case of the Immanuel, 2 Rob. p. 198.

It must be remembered, that for the greater accommodation of the neutral power, the commissioners of the navy are, by the prize acts, empowered to purchase, for the king's use, naval stores or provisions on board neutral ships going to the enemy, and brought into port by the king's men of war; and in general, all the native produce of the neutral country going to the enemy, is liable to capture, subject to a right of pre-emption (though formerly confiscable) by which right of pre-emption is meant, a right of purchase upon a reasonable compensation.

*Of the Goods of Friends found on board Enemies Ships.*(92).

The doctrine of Britain, and of most nations on this subject at present is, that the goods of friends on board enemies ships are to be restored; and it is remarkable that France, now in her weaker naval state so much inclined to cry out for the rights of neutrality, was singular in adopting the contrary principle, under the affected but well-known phrase, *robe de l'ennemi confisque celle d'ami*; and in the more general maxim, *ex rebus naves, & ex navibus res prædæ subjiciuntur*; and Heineccius notes, that Francis I. of France, established it as a maxim, that *naves neutrorum*

(92) The discussion of this question is found in Bynkershoek. Quæst. Pub. Jur. cap. 13.

*rebus hostium onustæ, et naves hostium una cum mercibus amicorum fisco vindicentur.* Hein. de nav. ob. vet. mer. vec. com. sec. 9.

The rule of Britain is said to depend upon this principle, that every man is allowed to transport his merchandize in the ship of his friend, though that friend happen to be our enemy. But it may also be conceived to consider the act as illicit, and the restoration as a matter of favour. Heineccius, however, and almost all writers, consider it as perfectly licit. Grotius appears to have doubted of the justice of this rule at an earlier period of his life, about 1602, when the Dutch had taken Italian property to a considerable amount on board Portuguese ships(93); but afterwards, when he wrote his treatise *De Jure Belli & Pacis*(94), fully accedes to the principle, in which Bynkershoek(95), and indeed the general modern practice

(93) Lib. 11. Histor. Belg.

(94) Published about the year 1625.

(95) Cap. 13. *Quæst. Jur. Pub. de Amicorum bonis in hostium navibus repertis.* He doth not however coincide in Grotius's defence of the French code (which said, *ex rebus naves, & ex navibus res prædæ subjiuntur*) by explaining that this supposes the knowledge of the owner of the cargo, for that would go to confiscate the friends property in the enemies ships, as well as the enemies ship carrying the friends goods; and he accuses Grotius of contradiction in not here admitting the rule of reciprocity. It may be true, but if Grotius had said that both trades were illicit, and that the exemptions were matter of favour, there would have been no contradiction.

coincides with him; and both coincide with the Consolato del Mare, which says, that if the friendly owner of the cargo will not enter into some reasonable agreement on account of the ship, the captor may send the vessel home to his own country; and in this case the merchant shall pay the freight which was to be paid at the delivering port, and the captor is not answerable for damages. If the captor will not be satisfied, he is answerable for damages; and Heineccius says, *vix ullam excogitare rationem possumus quare merces amicorum in navibus hostium nobis acquirantur. Inhumana est consuetudo. De Nav. ob. vet Mer. sec. 9.* Here again we are covered with astonishment by an assertion of Mr. De Martens, contrary to all fact and experience(96), that it is a principle now established, and which has been taken as the basis of almost every treaty since the middle of the seventeenth century, that neutral property is confiscated together with the hostile ships, in which it is seized. If continental Europe has such advocates, she surely will not complain of Britain for illiberality(97).

(96) On the rights and duties of neutrality.

(97) Without doubt, the owner of neutral property on board the enemies ship, will suffer much inconvenience; but his loss, says Vattell, is an accident to which he has exposed himself, and the captor in making use of the law of war, is not answerable for any accidents resulting from it, no more than if a neutral passenger, who happened unfor-

*Of Contraband.*

This discussion resolves itself into two parts; what is contraband, and what the effect or penalties of carrying it, on the ship, or the innocent part of the cargo, if such there be; for that powers at war may seize and confiscate all contraband goods going to the enemy; is universally acknowledged(98).

Many vain attempts have been made by writers in the closet to form exact enumerations of what are contraband goods; and, even where treaties have undertaken to specify them, they have left endless room for doubt. Vattel, therefore, wisely says, they are such as arms, military and naval stores, timber, horses; and even provisions when there are hopes of reducing the enemy by famine. The truth is, they must ever be fluctuating, and depend upon the circumstances and *status belli*. Thus Grotius says, that in judging of articles of a

tunately to be in an enemies ship, should be killed in the engagement, book 3. ch. 7. sec. 116.

All writers agree that the fair presumption is, that all goods found on board an enemies ship are the enemies, till the contrary be proved.

(98) Beawes, in his *Lex Mercatoria*, has given the attempted enumeration of contraband in certain treaties.—Hubner has attempted to enumerate them: but none of the great authorities, Grotius, Bynkershoek, Heineccius, and Vattel, ever attempt a specific enumeration. They saw the impossibility and the absurdity of such an attempt.

doubtful nature, our judgment must be guided by the state of the war(99); and Heineccius admits, that a particular state of the war may convert a thing instantly into contraband in its own nature of the least importance(100), for instance tobacco; and thus articles of the greatest consequence, such as provisions(101), may or may not be contraband, according to circumstances. Among favourable circumstances are these, that the articles should be of the growth of the country which exports them; that they should be in their native and unmanufactured state; and that they should be intended for the ordinary uses of life. So the nature and quality of the port to which the ship is going is not an irrational test; and thus the nature of the war is sometimes our guide, as pitch and tar have been held contraband in maritime wars.

It has been contended(102), that in transporting articles of his own country's native produce, a man is not to be restrained; yet it is plain that this

(99) *Distinguendus belli status.*

(100) *De Jur. Civ. Com. sec. 12.*

(101) In 1793, the American minister remonstrated against Britain as stopping provisions going to France, not as a conduct always contrary to the law of nations, but as then unnecessary, provisions being cheaper in France than in England. Britain, however, thought it necessary, and so did Spain and Russia, then hostile to France, and all these powers persisted.

(102) See Mr. Ward on Contraband.

circumstance can make no difference, where the rights of others are concerned; and though stress has been laid on the custom among belligerent powers of purchasing such commodities from the neutral, that mode is easily shewn to be a relaxation of right, and not an acknowledgment of wrong:—since, if there was not a right of preventing the voyage without paying for the cargo, neither could there be with such payment, that circumstance making no difference as to the original right of impediment and detainer.

The effect on the ship was formerly forfeiture, a penalty strongly vindicated by Bynkershoek(103) and Heineccius(104). In modern practice, except where the contraband articles belong to the owner of the vessel, or where the case is attended with particular circumstances of aggravation, the penalty has been mitigated to a forfeiture of freight and expences(105).

With respect to the cargo, the contraband is forfeited; and if there be innocent articles, they also are forfeited, if they belong to the same owner, otherwise not, agreeably to the rule laid down by

(103) *Publicabam quoque naves amicas si scientibus dominis contrabanda ad hostes deferrent; & nisi pacta impediant, omnino publicandæ sunt, quia earum domini operantur rei illicitæ.*—Bynk. Q. J. P. lib. 1. ch. 14.

(104) *Certi juris est, ob merces illicitas, naves etiam in commissum cadere.*—Hein. De Nav. ob. vet. Mer. Vec. Comm. ch. 2. sec. 6.

(105) See 1 Robinson's Reports, p. 288.  
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Bynkershoek, who says, "Omnino distinguendum  
 "putem an licitæ & illicitæ merces ad eundem  
 "dominium pertineant, an ad diversos; si ad eun-  
 "dem omnes recte publicabuntur, ob continentiam  
 "delicti(106)."

We should altogether distinguish, says he, in my opinion, whether the lawful and unlawful goods and merchandize belong to the same or to different owners. If to the same, they are all justly confiscable, for the continuity of the offence.

And this is perfectly reasonable; for though there is misconduct in the owner of the vessel, there is none on the part of the owner of the innocent part of the cargo.

### *Of Blockaded Ports.*

Grotius and all writers on the law of nations admit, that no commerce or intercourse whatsoever is to be allowed to a neutral with a blockaded port; but Grotius adds this limitation, if surrender or peace be expected(107).

This limitation Bynkershoek condemns, as neither agreeable to reason, nor to the conventional law of nations. "How doth reason," saith he, "make the neutral a judge of the probability  
 "of the surrender or the peace? And will it be

(106) Quæst. Pub. Jur. cap. 12. whose title is, An Licitum ob Illicitum Publicetur.

(107) De Jur. Bell. & Pac. lib. 3. ch. 1. sec. 5.

“said, that if there be no such expectation, any thing may be carried to the besieged? No; no intercourse whatsoever is allowable during the siege(108).”

Grotius also conceived that the neutral was to pay damages; but if the neutral vessel was stopped before it reached the town, it was only to be detained until security was given against similar attempts. But the more modern Dutch jurist(109) justly holds, that the property is to be confiscated; nay, often the carriers punished with corporal, if not capital punishment; and as to paying damages, he asks, what individual could pay the damage arising from the town's not being taken?

Vattel says decidedly, “*All* commerce is *entirely* prohibited with a besieged town(110);” and adds, “If I lay siege to a place, or *only* form the blockade, I have a right to hinder any one from entering, and to *treat as an enemy* whoever attempts to enter, or to carry any thing to the besieged without my leave, for he opposes my enterprize, may contribute to the miscarriage of it, and thus cause me to fall into all the evils of an unsuccessful war.” And both he

(108) Quæst. Pub. Jur.

(109) Quæst. Jur. Pub. lib. 1. cap. 11. Obsessis urbibus castris, portubus, an quicquam liceat advehere.

(110) Book 3. ch. 7. sec. 117. he mentions the instance of the Dutch preventing the English intercourse with Dunkirk when by them besieged.

and Grotius mention the instance of Demetrius hanging up the master and pilot of a vessel carrying provisions to Athens, when by him almost reduced to famine, as recorded by Plutarch.

The humanity of modern times has departed from the severe strictness of the law of nations, and contents itself with confiscation; but this restriction upon neutrals is undisputed, and the only controversies that have arisen have been, whether the place was blockaded, whether that blockade was sufficiently notified, how far the penalties extend, and whether any particular circumstances exempted from the penalty.

Nothing further is necessary to constitute a blockade, than that there should be a force stationed to prevent communication, and a due notice or prohibition given to the party(111). It is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind (if the suspension, and the reasons of the suspension, are known), that will be sufficient in law to remove the blockade(112); and taking advantage of such accidental removal is mere fraud.

Due notice of the blockade may be by the simple fact, or by a notification accompanied with the fact. In the former case, when the fact ceases (otherwise than by accident, or the shifting of the wind) there is immediately an end of the blockade; but where the fact is attended with a public notification from

(111) 1 Rob. p. 87.

(112) Ibid

the government of the belligerent country to neutral governments, it must be supposed to exist till it is publicly repealed; and when it is discontinued, that also should be publicly notified(113). When the notification is not accompanied with the fact, as was the case of a proclamation in the West Indies in 1794, it is not sufficient(114). To enquire, not at the mouth of the harbour, but in neighbouring ports, whether a blockade, after a considerable lapse of time, is still continued, has been allowed to distant nations, as to America for example, who had not means of constant information(115).

There must also, of course, be time for parties at a distance to get knowledge of a blockade; and where it is a blockade *de facto*, it should be notified by the blockading force to vessels going in, for those coming out must be presumed to know it (116); and as to those coming in, I conceive, if it be proved that they actually did know it *by any means*, it is sufficient.

A notification bars the plea of ignorance, for it is the duty of every government receiving it to acquaint its subjects(117); and though a notification *proprio vigore* doth not bind any country but that to which it is addressed, yet in a reasonable time it must affect neighbouring states with

(113) Rob. 171.

(114) Robinson, p. 94.

(115) 1 Robinson, 332.

(116) *Ibid.* 151.

(117) 2 Rob. 112—129.

knowledge, as a reasonable ground of evidence (118).

Nothing but absolute and unavoidable necessity will justify the attempt to enter a blockaded port ; such as admits of no compromise, and cannot be resisted ; not the avoiding higher fees, or any slight difficulties(119) ; but the meaning of the blockade is not to be extended by the force blockading.

The sailing with intent to evade a blockade is an overt act constituting the offence(120) ; and a blockade is just as much violated by a vessel passing outwards as inwards. There are cases indeed of innocent egress, where vessels have gone in before the blockade ; but if they attempt to bring out a cargo, it is a violation of the blockade, if it was taken on board after the commencement of that blockade(121).

If a ship break a blockade, though she escape the blockading force, she is, if taken in any part of the voyage, taken *in delicto*, and subject to confiscation(122).

The ship attempting to break a blockade is, as we have seen, liable to confiscation ; its cargo may be so also, though not contraband, if the owners of that cargo were conusant of the blockade before they sent or shipped it, although they might

(118) 2 Rob. 112.

(119) Ibid. 127.

(120) 1 Rob. 156.

(121) 1 Rob. 88 and 151.

(122) 2 Rob. 130.

attempt to throw the blame on the carrier master, if such an attempt was proved to be founded in artifice: but if they were really ignorant of the fact, the master is not their agent to bind them by his contract or his misconduct.

Ships sometimes obtain *licence*, and in honest cases that licence is to be construed liberally; so that it is a benefit incident to the licence, and inseparable from it, that the ship shall be allowed to come out again; and a case has happened, where she was allowed to come out with a returned cargo(123), although, without such licence, a neutral vessel would have no right to take out a cargo, unless put on board before the blockade, though she might go out in ballast.

Where there is no licence, general excuses, such as those of want of water and provisions, are extremely discredited, on two grounds: 1st. That the fact of attempt to enter the port is strongly against them; and secondly, that the explanation is always dubious, and liable to the imputation of coming from an interested quarter(124).

### *Of the Right of Search.*

The right of search, at least, extending to the inspection of papers, if not to a thorough examination of the cargo, with the little attention on

(123) Case of the *Juno*, 2 Robinson's Reports.

(124) 2 Robinson's Reports, p. 125.

this head to be paid to the flag, is thus distinctly expressed by Bynkershoek(125): “Non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis, constare oportet, navem amicam esse. Si id constet dimittam; si hostilem esse constiterit, occupabo. Quod si liceat, ut omni jure licet, & perpetuo observatur, licebit quoque instrumenta quæ ad merces pertinent, excutere, & inde discere, an quæ hostium bona in navi lateant.”

Vattel's words on this subject are so emphatic, that they merit to be literally transcribed. “Without searching neutral ships at sea,” saith he, “the commerce of contraband goods cannot be prevented. *There is then a right of searching.* Some *powerful* nations have indeed, at different times, refused to submit to this search, as formerly France, in the reign of Queen Elizabeth. At *present*, a neutral ship refusing to be searched, would from that proceeding alone be condemned as lawful prize(126).”

(125) It is not by a national flag, perhaps fraught with fallacy, but by the very instruments found in the ship, that its friendly character must appear. If it doth appear, I would dismiss it; if, on the contrary, it appear to be hostile, I would seize it; which, if it be allowed, as it is and always was by every law, it must be lawful also to scrutinize the instruments appertaining to the merchandize, in order to learn from thence whether any enemies goods are hid in the ship.

(126) Book 3. ch. 7. sec. 114.

He adds, indeed, that to avoid inconveniences, violence, and every other irregularity, the manner of the search is settled in treaties of navigation and commerce—and that, according to the present custom, credit is to be given to certificates and bills of lading, produced by the master of the ship, unless any fraud appear in them, or there be very good reason for suspecting their validity.

Both these great authorities appear to concur that there is a right of search; but their expressions may possibly be said to be ambiguous whether this right extends beyond the inspection of papers. Let us here then have recourse to the court of reason, and ask ourselves whether the *instrumenta* may not be as fallacious as the *aplustre*—the papers as the flag? What real satisfaction can ever be had without an actual search of the cargo? And if there be any thing irregular or vexatious in the circumstances of that search, the party is always liable to punishment by a tribunal which has never been known to pass over such offences, without inflicting proper punishment. Justly, therefore, did Sir William Scott, in a late most remarkable case, that of the *Maria*(127), or, as it is commonly called, of the Swedish convoy, hold and maintain it, as it has been here maintained to be, one of the rules taken by the British nation from the general law of all nations, that the right of visiting and searching merchant ships upon the high

(127) Robinson's Reports, 340.

seas, whatever be the cargoes the ships or the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation ; a right to be exercised with as little harshness and vexation as possible, but still a right undoubted, and acknowledged even by Hubner. If free ships did make free goods, how is it to be known that they are free ships save by examination ?

Heineccius appears to me to be clearly of this opinion, when he says, after stating the presumptions of fraudulent and contraband cargo, from false papers and spoliation, "*Accedunt tamen alie præsumptiones, in quibus nescio an primum sibi locum vindicent signa mercatorum in cistis, quas marcas appellant*(128)." The marks, therefore, on the bales of goods form a violent presumption. How are these marks to be examined, but by going below deck and examining the cargo ?

The consequence of resisting such a search is the confiscation of the property withheld from visitation. It is a wild conceit, saith the same great judge so often mentioned, that whenever force is used, it may be lawfully resisted ; a lawful force cannot lawfully be resisted. It is a principle of the civil law, on which great part of the law of nations is founded, that resistance to the search we have described is justly followed by confiscation. It is a principle

(128) Heineccius *De Nav. Ob. Vet. Mer. Vec. Comm.* sec 11.

adopted by all modern nations—by France, in her ordinances of 1681—by Spain, in those of 1718—and by the orders of council in Britain, in 1664. And I have already given the words of Vattel, expressly approving while he states the universal modern practice.

One matter of controversy however remains, whether merchant vessels under convoy of a king's ship, and the protection of their sovereign's naval flag, are exempted from search; for this exemption the northern powers, and their literary champion Schlegel, have strenuously contended; and Mr. De Martens, with his usual facility, has admitted their clamorous assertion as a dogma.

These innovating pretensions were also exposed with infinite force by the court which presided in the case of the Swedish convoy, in the year 1799, and as it would be an idle and vain attempt in me to try to state the opinion there held in a more expressive manner than that of the language of the learned judge, and would be only weakening its force, I hope it may be permitted to me upon this, as upon other occasions, to use his very words as reported(129). The authority, says he, of the sovereign of a neutral country, interposed in any manner of mere force, cannot *legally* vary the rights of a lawfully commissioned belligerent cruiser. Two sovereigns

(129) By Dr. Robinson, 1 vol. p. 340. case of the Maria, Paulsen, master.

may unquestionably agree if they think fit (as in some late instances has been agreed)(130) by special covenant, that the presence of one of their armed ships, along with their merchant ships, shall be mutually understood to imply, that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality : and if they consent to accept that pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it. As to insinuations, that it might possibly be well if such a security were accepted, it is not necessary to descant upon such unauthorized speculations. The law and practice of nations give them no sort of countenance.

If I might be permitted to add any idea to the sentiments of that great civilian, who may be considered in our days, as it were, the steady oracle of maritime jurisprudence, amidst the wild speculations of naval Europe, I would ask a distinct explanation of the meaning intended to be conveyed by the attendant flag of a neutral State accompanying a fleet of merchantmen? Doth it

(130) Between America and Holland in 1782.

purport that the captain of the conveying man of war has previously examined all the cargo under his protection? This is not his duty. Doth it mean to certify that the exported cargo hath been accurately scrutinized by revenue officers? This is not the fact, and if it were so, how doth it judicially appear to the captain of the conveying frigate, or how is he authorized to re-certify it? Lastly, doth it purport that the State will exert its power, however lawless and unjustifiable, to protect its flag, however insolent? The intention of such absurd defiance of justice cannot be supposed(131).

I cannot do so much justice to this argument, as by putting it in the very words of a most eminent writer on these subjects, the Earl of Liverpool, who says, if no examination is permitted of mercantile ships sailing under convoy,

(131) The minister, in a late speech on the state of the nation, March 1801, insisted on most of the points hitherto mentioned. 1st. He denied that free ships make free goods, on the ground both of the general law of nations, and of particular treaties. 2dly. Insisted that all articles applicable to the use of war, were contraband. 3dly. That if blockading ships, though not close to the place, were so near that a ship could not enter without risk of being captured, it was sufficient blockade. 4thly. He denied the right of neutral nations to carry on any trade which they were not permitted to do before the war. 5thly. He denied the right of neutrals to protect their merchant vessels from visitation by granting escorts.

all the stipulations in subsisting treaties, which authorize the detention and capture of contraband articles, would thereby be rendered nugatory: and from henceforth every belligerent power must rest wholly on the good faith of the officers of a neutral government, who have *no sufficient interest* in detecting frauds; and who, on the contrary, may have an interest to protect, and even encourage transactions the most injurious to the belligerent; it is certain, that if this doctrine be admitted, the smallest State may lend its flag, and by hoisting it on board a cutter or sloop, protect any number of ships under its convoy, from the whole naval power of Britain(132).

The general rules of the law of nations which have been given, may, by mutual agreements between nations, be varied, or departed from; in which case the law of nations only governs so far as it is not derogated from by the treaty.

Thus by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search, on the faith of producing solemn passports, and formal evidences of property duly attested(133).

(132) Preface to his new edition of the Discourse, &c. printed 1801.

(133) This is the case with respect to Russia, by the late treaty, given in the appendix.

Particular treaties too have inverted the law of nations, and by agreement declared the goods of a friend, on board the ship of an enemy, to be prize ; and the goods of an enemy, on board the ship of a friend, to be free.

So likewise, by particular treaties, some goods reputed contraband by the law of nations, are declared to be free.

*Of the Proofs of Enemies' Property.*

The right of search being established, our next consideration is, what are the most rational and satisfactory proofs of the justice of detention ? It is true, that they cannot be brought to any exact formula, (which shews the absurdity of limiting the searchers to a precise definite conduct, they acting at their own risk) but yet there are some usual marks of fraud, and indications of hostile property, worthy of remark.

Such are, the carrying false or colourable papers, or double sets of papers by way of deceit,—if proper ships papers be not on board,—if the master and officers(134), being examined in præpatorio, grossly prevaricate,—if there be spoliation and ship's papers thrown overboard,—if the master and crew cannot tell whether the ship or cargo be the property of a friend or an enemy.

(134) See the Answer to the Exposition Des Motiss.

The suppression, or spoliation of papers, is always considered as a proof of *mala fides*, and where it appears, it is the universal rule to presume the worst against those who are convicted of it, nor can it be explained away by saying they were private letters.

Much also may be collected from the nature of the crew, and knowing to what nation they belong, as also from the national character and *domicile* of the master, which word domicile, though familiar to the civil law, being, as Sir L. Jenkins observes, little understood, it is necessary here to dwell a little upon its explanation.

The *Domicile*(135) of any man is the place where he resides, with an intention of always staying there. He who stops for a time, however long, in any place, for the management of his affairs, has a simple habitation there, but no domicile. An ambassador has not his domicile in the court where he resides. Domicile is either *natural* and original, or accidental and *acquired*. The first given by birth, where the father had his,—the other acquired where we settle by our own choice. To this the Imperialists add a third, the *common*, or domicile of the empire.

The domicile of origin or birth is immutable. No man can get rid of his allegiance by changing his habitation. The domicile of residence is

(135) See Vattel, book 1. ch. 19. sec. 218; and Gail, lib. 2. Observatio 36.

mutable at pleasure, and yet it produces effects which the other doth not; for the forum of any man by reason of domicile, by the law of nations is in the place where he is born only, if he be there found; but in the place of his known and acknowledged residence, whether he be found there or not(136). No man can have two acquired, any more than two original, domiciles(137).

The force of the word may also be explained by examples. Nothing can be more cogent, says a reporter of our own, to denominate a man of a country, than his being a burgher(138), and taking an oath of allegiance.

A man being a burgher, and paying scot and lot, and being subject in his body and goods, says Sir L. Jenkins, makes a domicile, though he have a house in another place, and was born in a third(139).

Time is of great efficacy in fixing domicile(140), and six years residence in a country has been considered as constituting domicile(141). Traffic also may stamp a national character on an individual, independent of that character which mere personal residence may give him: thus if a person enters into a house of trade in an enemy's

(136) See Gail, lib. 2. Observ. 36.

(137) Sir L. Jenkins, 2 vol. 783.

(138) Comyns, 689.

(139) 2d vol. 789.

(140) 2 Rob. 325.

(141) Ibid. 342.

country, in time of war, or continues such a connection during the war, he shall not protect himself by mere residence in a neutral country. A single man, master of a ship, who has established no domicile by family connections, and in his own person is employed constantly for several years in the vessels of a country not that of his birth, in their trade, has been considered as divested of his national character. A nominal residence, not taken up honestly with intention of making the place really that of habitation, is plainly a mere subterfuge. Mariners are characterised by the country in whose service they are employed. Vessels have been ruled to derive their national character sometimes from the residence of the owner; sometimes from the pass under which they sail; sometimes from their employment and course of traffic. But after all, we must always keep in recollection the words of Sir William Scott, who says(142), *domicile* is a question of great difficulty, depending on a great variety of circumstances, hardly capable of being defined by any general precise rules, and the difficulty increased by the variety of local situations in which the same individual is found at no great distance of time, in consequence of the present active spirit of commerce, and from the extended circulation by which the same transaction communicates with different countries.

(142) 2 Rob. 322.

The national character of the vessel is prima facie determined by the national character of the owner, but circumstances in the conduct of the vessel itself, may lead to a different conclusion. Thus, if she is navigating under the pass of a foreign country, she is considered as bearing the national character of that nation under whose pass she sails: and in like manner, if a vessel purchased in the enemies country, is by constant and habitual occupation, continually employed in the trade of that country, and this evidently on account of the existing war, it is to be deemed a ship of the country in whose trade it is so employed(143).

#### *Of Competent Courts of Prize.*

The answer to the Exposition Des Motiss, contents itself with saying, that every crown has a right to erect admiralty courts for the trial of prizes taken by virtue of their commissions, but none has a right to try the prizes taken by another, or to reverse the sentences given by another's tribunal. The only regular method of rectifying their errors, is by appeal to the superior court. That this is the clear law of nations, and by this method prizes have always immemorially been determined in every other maritime country as well as England; and no injury is done to the

(143) 1 Robinson's Reports, p. 13.

party, for the matter is tried not by the municipal law of the country, but as it would at his own domicile, according to the law of nations and particular treaties; according to the general law of nations, modified by the treaties between his nation and ours. Any other method of trial would be manifestly unjust, absurd, and impracticable.

This famous answer doth not say why it is the established method, nor give proofs and authorities to shew that it is the clear law of nations. For these I conceive we must look into the numerous treatises of modern Jurists(144), as well as the dicta of the civil law *de foro competenti*, and *Quomodo quis forum sortiatur*; and from thence we find that the natural and original forum of every man was in the place of his domicile; but if he contracted or offended abroad, and was at any time found in the place that witnessed his contract or his crime, he was there convenable: above all, if his contract or his delinquency affected his property or *res*, the trial of that property took place where that property actually was. Thus, though the ecclesiastics warmly urged the plea of *actor sequitur forum rei*, to secure to themselves, in all cases, the privilege of an ecclesiastical tribunal, yet, in real actions, they were convened before

(144) See, amongst others, Gail, lib. 1, 37. and lib. 2, 36, and the mixed observations of Bynkershoek in his Essay De Foro Competenti Legatorum.

the lay judge; and thus, as Huberus has observed by the custom of modern Europe, in countries and courts where the proceedings are *in rem*, if the creditor finds in his own country any property of his foreign debtor, he may lay hold of it, and bring his claim to it before his own tribunal; a practice which gave rise to the custom of *foreign attachment* in the city of London.

On both these grounds it is plain, that the legality of captures as prize, is properly cognizable in the courts of the captor. There the alleged delinquent is found, and there the thing captured is brought(145).

When it is said that a pirate may be punished in any country where he is found, it is but the application of a general principle; so may any offender; and so a congress of ambassadors determined, as to persons pretending to act under letters of reprisal after their revocation, who are said by Woodeson and others (though I do not see why) not to be pirates.

Thus far of the proper court of prize as between belligerents. The utter incompetency of a neutral

(145) On the same principle Sir L. Jenkins mentions that *renvoy* of a criminal is not now known among princes; and Bynkershoek, that a foreigner who has injured one of our countrymen, and is at any time after found here, may here be punished; and mentions, though doubtingly, like instances where the injury has been done by one foreigner to another. See 2 Sir L. Jenkins, 714; and Bynkershoek, de *predatoria privata*. The case in Sir L. Jenkins decides the question where both are foreigners.

court to try their prize controversies, the hostility of attempting to do so, or of suffering the belligerent to hold his courts in the neutral country, has been already shewn.

### *Of Reprisals.*

The right of reprisals(146), a barbarous word, originally means a right to seize upon things and persons, given to individuals in consequence of injuries received, when another may be taken instead of the offender, and another's property instead of his, though no actual, formal, or general war commenced.

The power of reprisals is also frequently granted after war commenced to private armed ships, not in the actual pay or immediate service of the sovereign. They are a mode of reparation authorized by the law of nations, when the subjects of one State have been injured by those of another, and justice has been solemnly called for and denied by the other; on which the sovereign of the complainants issues to them authority to seize the bodies and effects of the subjects of the other State, in order to enforce satisfaction. It was sometimes called *Pignorat*io and *Androlepsia*, in imitation of the Athenian *Androlepsia*, a law

(146) *Repræsalie* barbaro vocabulo, dicuntur *pignorationes rerum & personarum*, quando unus pro alio, & res unius pro re alterius apprehendatur. Gail, De *Pignorationibus* Observatio 2, a.

authorizing to seize the three next citizens of that place to which a murderer had fled.

It has been much disputed whether they are tolerated by the divine and by the canon law, and the authority of St. Augustine has been quoted to shew that we have a right to make war upon nations who deny justice to us, but which appears too general an expression to apply to reprisals in their usual confined meaning. They are said to have been derived from the old custom at Rome, of taking satisfaction for injuries out of enemies property, if it was refused after due admonition by the *feciales*. Yet the Roman emperors discountenanced reprisals, for a plain reason, because they naturally lead to lawless violence, and the production of general war.

The justice of reprisals is thus vindicated by Grotius(147); "Naturaliter ex facto alieno nemo tenetur nisi hæres. Jure tamen gentium introductum ut pro debito imperantis teneantur res & actus subditorum. Aliter impunitas, quia bona imperantium sæpe non tam facile possunt in manus venire, quam privatorum qui plures sunt."

This plain reasoning, acknowledged by all the world to be valid, without a dissentient voice before our paradoxical times, may serve as an answer to that wonderful position, that war means military war and commercial peace.

(147) Grotius, book 3. ch. 2.

Let me add, if it were necessary, the authority of Vattel, who says, *all* the subjects of states at war are reciprocally enemies, book 3. sec. 70; and Barbeyrac agrees, that private persons are answerable with regard to strangers, for what the society or governing powers do or owe (148).

But Heineccius goes further: "Grotius," says he, "thinks that reprisals cannot be justified by the law of nature, but I think they may, and that we need not have recourse to the law of nations. *Nam respublica ratione alterius reipublicæ consideratur ut una persona moralis*; one State with respect to another is considered as a single moral individual, and if the sovereign will not pay, the nation becomes the debtor, who cannot complain of injury, for when they submitted their wills to that of their sovereign, they became sureties for his actions, and they have redress even against their own government (149).

Reprisals are spoken of in a statute of Edward III. (150) as a known and established usage, and the method of proceeding is specified in a statute of Henry V. (151); viz. upon complaint of the injured party upon oath, the Lord Privy Seal is to make out letters of request to be preferred, not

(148) In Grotium. de Jur. B. & P. book 3. ch. 2.

(149) *Prælectiones* in Grotium. I translate this from the first volume of the Geneva edition of Heineccius, in eleven volumes quarto.

(150) 27 Edward III. stat. 2. cap. 17.

(151) 4 Hen. V. ch. 7.

only to the aggressor, but to his sovereign, and if justice be denied, or delayed, the Lord Chancellor is empowered and required to issue letters of marque (152) and reprisal under the great seal.

Reprisals are of two kinds, ordinary and extraordinary, and the ordinary either within the realm or without, granted when any English merchants have suffered by merchants foreigners in their persons or goods. If the merchants strangers, or their goods are in England, a writ may issue out of chancery to arrest them; if not, letters patent may pass as above-mentioned, under the great seal, which vest a national debt in the grantee, to be satisfied in such manner, and by such means, as such letters patent direct, out of the goods and estates of that prince's subjects who refused or illegally delayed justice. Of these ordinary letters of reprisal, precedents may be seen in the collection of the sea laws, and in Beawes' *Lex Mercatoria*. Extraordinary reprisals were authorized by letters of marque granted by the secretaries of state with the approbation of the king in council, but both seem in practice to be entirely superseded by the letters of marque and commissions to privateers, granted by the lords of admiralty, by virtue of the prize acts; and indeed the ancient method of empowering the

(152) This word *marque*, or *marche*, is used because they give power to pass the marches or boundaries of the enemy.

individual to redress his own private injury by making war, must obviously have been fraught with infinite inconveniences.

Letters of reprisal may be revoked either expressly or impliedly, by the cessation of hostilities between two countries. No doubt ever was entertained of this as to general letters of marque, not given to the individual for the reparation of his own private injury; but a most singular controversy did occur on that subject before Lord Chancellor Nottingham, the executor of a grantee of reprisals, insisting upon his right, even against his majesty's will(153).

### *Of Privateers.*

Since privateers are commissioned by the admiralty, those commissions revocable by the same authority, and their conduct in many respects examinable and punishable in that court, it is not foreign from our purpose to give some account of them, and of the regulations concerning them. The discussion, says Bynkershoek, appertains to that of public law, because they cannot act without public authority, and because they often occasion controversies which disturb the public weal(154).

(153) 1 Vernon, 54, 55. It is observable, that in this case, chancery is said to have admiral jurisdiction.

(154) See Bynkershoek, *De Prædatoria privata*. Mr. De Martens of privateers. Beawes' *Lex Mercatoria*, head *capias*, &c.

In the earlier times of Rome, no man but the public soldier of the State could, *de jure*, kill the public enemy(155). Afterwards private societies were allowed to be formed for the purposes of annoying the foe(156). In modern times, for several ages past, States at war have not only exerted the public power, but have gladly embraced the assistance of private adventurers.

Thus individuals in the United Provinces, in their great contest for independence against Spain, fitted out numberless private ships of war, which at first received pay and reward from the State, but afterwards were contented with their chance of plunder. Albericus Gentilis calls them pirates; a word formerly of ambiguous meaning, and not always used in a bad sense; but if taken in its usual acceptation, absurdly applied to any power commissioned and authorised by the State and committed to its own subjects. Since that period, they have been in use with every maritime nation of Europe, every proper precaution being first taken to prevent abuses by obliging them to give security.

The arguments for and against their use may be reduced to the following: It is said, that it is a practice liable to great disorders.—That ferocious men will not easily be confined to lawful spoil, and that in fact their abuses have been often intolerable, and have often involved na-

(155) Cicero de Officiis, lib. 1. cap. 36.

(156) Ff. 4. De Collegiis & Corporibus.

tions in war; and the authority of Lord Clarendon is quoted, who warmly inveighs against their predatory conduct in his time, exposing the inhumanity of the crews, and the mischief done to his majesty's service by encouraging desertion, from the hopes of partaking in a more profitable warfare. On the other hand it is said, that all the subjects of hostile States are reciprocally enemies; that it is meritorious in every one of them to serve the State; that this is a method of annoyance particularly distressing to the enemy, and that every care has been taken to guard against abuses, which in later times have not been very frequent(157).

The numerous precautions taken to prevent abuses have indeed very much put an end to the pristine invectives against privateering. At the onset security is required, to be approved of by the lords of the admiralty or admiralty board, by the prize acts; and by the same laws, they have no property in any prize, till it be adjudged lawful prize by a competent court of admiralty, and their commissions may be revoked for misbehaviour. Besides, by the same acts, ships taken by any collusion by a privateer shall be judged good prize to his majesty(158); and offences on board any privateer are cognizable as on board ships of

(157) By the Russian treaty, made in the present year, the right of search is not permitted to privateers.

(158) The prize acts are enumerated elsewhere.

war in the king's service. The size of the vessels to be employed as privateers is also often ascertained by parliament, to prevent any wretched miserable kind of subaltern piratical war(159); and if they embezzle either captured goods, or contraband taken out of a neutral vessel, they forfeit treble value; and if they ransom neutral ships, instead of bringing them into port to try the justice of detention, they are guilty of piracy (160). They are besides obliged, before they sail, to deliver in a list of their men to the chief officer of the customs; and though in some wars they have been allowed to have foreign seamen, one-fourth of the crew was always British.

*Of the Rights of Neutrals.*

The rights of neutrals may be considered, as far as regarded by the maritime code, in relation to the protection of their trade, and to the security of their own coasts. It has already been admitted that their commerce is to be left as extensive as it was before the war; that they are not to be prevented from importing for their own use, or carrying on their accustomed trade, or exporting their commodities, not contraband, to places not block-

(159) See 32 Geo. II. ch. 25.

(160) 32 Geo. II. ch. 25. This act shews the extreme attention of England, not to do injury to the neutral powers.

aded; that they may even carry enemies' goods, without being liable to confiscation of the ship, nay, with allowance of freight and expences, if it be not in the enemies' coasting or colonial trade; and that where they carry articles of their own native produce, though contraband, the belligerent powers only claim a right of pre-emption.

*On this Right of Pre-emption*

Some remarks are necessary. It means a right of purchase, upon reasonable compensation to the individual whose property is thus diverted; but to this favourable rule the captured is not entitled, if there be not a perfect *bonâ fides* upon his part. As to him, therefore, it is rather an indulgence than a right, founded on this idea, that it is a harsh exercise of a belligerent right to prohibit the carriage of these articles, which constitute so considerable a part of his country's native produce and ordinary commerce(161).

On the side of the belligerent this claim doth not go beyond the case of cargoes avowedly bound to the enemies' ports, or suspected on just grounds to have a concealed destination of that kind: and on the side of the neutral, the same exact compensation is not to be expected which he might have demanded from the enemy in his own port;

(161) See 1 Robinson, p. 241.

*e. g.* the enemy might be distressed by famine, but intercepted provisions are not to be paid for at the price of distress which they would give (162).

The right of taking possession of such native produce, and even of provisions, is no peculiar or modern claim. It was the practice of the ancient maritime states of Europe to confiscate them entirely; and this custom was retained by some of them until within the century last past. The mitigated practice of pre-emption has existed only in modern times.

The right of pre-emption of vessels and stores captured, existing in the commissioners of the navy and master-general of the ordnance by the prize acts is of a totally different nature, and relates merely to the captor.

The security of neutral shores, and their freedom from violation by hostile violence, together with the extent of the legal protection and aid which they can afford to an enemy, remain to be considered.

All writers on public law, without exception, agree that force is not to be committed in a neutral port or territory, or the immediate and close vicinity thereof; and that whoever is guilty of it, commits an outrage against the neutral power,

which is bound to see restored any captures there made(163).

Besides the insult to the neutral, and the protection he owes his friend, another objection to a contrary practice is obvious—the danger which would occur to the peaceable and innocent inhabitants of the neutral country from the emission of hostile weapons, and the conflict of arms near their shores and on their coasts. But if the enemy has been attacked in the open sea, he may be pursued to the neutral shore, but not into the very harbours, nor so as to endanger the neutral subjects; and it is said, that if the ships of the pursuers are fired upon by the forts of the neutral, in such a case they ought not to return the fire, but rather relinquish the chase.

But while the neutral ports are thus secured from insult, it is the duty of that neutral power not to suffer those ports to become sites for hostile equipment against the belligerent, nor to suffer courts to exist in its country, assuming powers of condemning captured ships not yet brought into the hostile territory, nor to aid one power at war against the other in any such manner; for then it

(163)<sup>o</sup> See Bynkershoek, cap. 8. Quæ. Pub. Jur. *An hostem liceat aggredi vel persequi in amici territorio*, and the examples there put. He justly condemns, on these principles, Van Tromp's attack on the Spanish fleet in the Downs, and that of the English on the Dutch East India ships at Bergen, in Norway, in 1665.

would evidently cease to be neutral, and the approach to its shores be as dangerous as to those of the open and avowed foe.

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Such have been the principles maintained by Britain, founded in reason, conformable to the law of nations, and consonant to the dictates of nature. They must be ever true, and therefore ever just, even if this country should at any time, or in any instance, think it politic to relax or recede from them, which in the opinion of the ablest men it never can, without essential detriment to its interests, diminution of its glory, and abatement of its prosperity, security, and power.

Since the preceding part of this chapter was written, the sudden and joyful tidings of peace have burst upon us. The knowledge, therefore, therein comprized, may appear for the instant of less utility; but it must be recollected, that whatever may be our love or our hopes of peace, wars in the nature of things must recur, and this rudimental information must for ever be necessary. Happy should we be if eternal concord amongst nations rendered it unnecessary to extend our views beyond those civil and commercial regulations which employ

the attention of the instance court, and which were discussed in our preceding chapters(164).

(164) The question of prize doth not immediately cease with the restoration of peace. All prize cases then depending must of course be decided: but besides, the royal proclamation always reserves a time within which captures made in certain regions, though after preliminaries signed, shall be valid. Thus, in the last proclamation of 12th October, 1801, all captures in the British Channel and North Seas after twelve days from the signing the preliminaries, were to be restored—after one month, if made any where from said places to the Canary Islands—two months from thence to the equator—five months in all other parts of the globe.

## CHAPTER VIII.

OF A ROMAN SUIT, OR ITS CONDUCT BY THE  
ANCIENT CIVIL LAW.

THE history and analysis of a Roman suit is interesting, as it may in some instances elucidate and explain points of modern practice not derivable from any principles of modern laws, and in fact without some knowledge of it, that of our modern ecclesiastical courts, of our courts of equity, but most particularly of the court of admiralty, is unintelligible: thus in the ecclesiastical courts it does not appear why a proctor doth not become *dominus litis*, and cannot appoint a substitute until after contestation of suit, unless we are acquainted with the principle of the old Roman law, that no man could act or appear for another in a court of justice(1), and know that the fiction of the *dominium litis* was introduced to get rid of this most inconvenient maxim. And in courts of equity, the structure of a bill, and its repeating the same story twice, first in the shape of assertion, and then in the form of interrogation, will appear unaccountable to him, who is unacquainted with the old canon law practice as to

(1) Generalissima erat regula juris, per extraneam personam nil adquiri posse: hinc nemo pro alio agere poterat in judiciis. Vid. Heinec. Antiq. lib. 4. tit. 10. sec. 2.

the positions and the articles(2). Nor will it appear much more than an arbitrary distinction when a man is told, that he cannot in strict practice after issue joined amend his bill, though he may file a supplemental one(3), although all the proceedings are carried on before one and the same judge, till he knows that the bill in chancery is derived from the prætors' forum, where, after contestation of suit, the prætor could not amend, because the cause was gone from him to a different tribunal, viz. to the *decemviri lit. jud.* and the *judices*, and he had nothing before him to amend; nor could *they* amend or alter, any more than a judge or jury at nisi prius could alter the issue sent to them to be tried. I mention these only as the first instances that occur.

In the ecclesiastical courts, however, the influence of the civil is overpowered by that of the canon law; and in courts of equity its directions, though useful, are by no means predominant; but the court of admiralty, as the greatest of modern judges, Lord Hardwicke, has observed, proceeds entirely by the rules of the civil

(2) This shall be presently explained. It is remarkable that this superfluous tautology has been corrected in the ecclesiastical courts, and not in the courts of equity: for in the former, the personal answer of the party is demanded to the assertions and charges of his adversary, without putting these into the form of interrogation.

(3) See Howard's *Equity Side of Exchequer*, vol. 1. p. 269. This is now reduced to a more rational principle, that he cannot amend after publication. See Mitford, p. 53. and 258.

law, except in cases omitted, and therefore in that court a knowledge of the ancient practice of that law is indispensably necessary, and must be had previously to the study of the modern practice of that court.

The authors from whom this knowledge must be derived, give us little insight into the written pleadings and proceedings of antiquity, and usually speak as if all things were transacted *ore tenus*, in little short formulæ, such as took place amongst our ancestors in earlier times: on such scanty information, therefore, we must build the best superstructure we can.

The suit began by summoning or arresting the person of the defendant, and bringing him before the court; this the plaintiff did by his own private authority, without any writ(4), provided he found the defendant abroad, for every man's house was his castle, and he could not be taken within his own door. If he lay hid within his own house, instead of a *latitat*, a *public edict* was put up upon his door demanding his appearance, which being thrice repeated, if not obeyed in the third instance, a decree went against his goods and property(5).

When the plaintiff made his caption of the defendant, he called the persons present to wit-

(4) This was the case at least, until after the age of Pliny, vid. Pliny's Panegyric, cap. 36; but afterwards, in the days of Paulus and Ulpian, an authority from some court was required to arrest or summon any person.

(5) Like our distress infinite of old.

ness the fact, which was styled *antestari*, unless he made it up with his adversary on the way(6). The impugnant appearing before the prætor, the plaintiff chose his form of action, and applied to the prætor to permit him to proceed in that form, which was called *postulare actionem*, and then the plaintiff, or *actor dabat actionem*, gave notice to the defendant of its nature and cause, and the defendant gave bail(7), *vadis vadimonium*, to appear(8) *die perendino*, the day after the morrow.

This rude and barbarous method of dragging the debtor *obtorto collo* before the magistrate, by the mere authority of the party, unassisted by any legal officer, though, according to Huberus, opposition was considered as a contempt of the court, was, as Heineccius shews by quotations from Aulus Gellius, often attended with the greatest cruelty, and existed, according to the same author, until after the time of Pliny: but

(6) Horace Satir. 9. *Licet antestari?*

(7) Which may be compared to the bail to the sheriff, as the pactum or transactio, the making it up on the way of the *scripture*, may (and is by Blackstone) to an imparlance. Mr. Reeves and Mr. Cruise say, it reminds them of the *fine*, in the early parts of our history; the leave *interloqui* in interrogatory actions was more like an imparlance.

(8) Our period is less limited, the *quarto die post*, which I have heard in legal declamations ascribed to the sturdiness of our ancestors, who would not be obliged to appear directly, as if some such delay was not known to all laws.

before Justinian's days, a more rational one was introduced, and the defendant was summoned by the apparitors or officers of the court. From this last period, therefore, corporal arrest, except for crimes, seems to have been at an end, and the only object was to force an appearance as in our old common law, by distress infinite, and therefore Judge Blackstone, speaking of our old process by summons and distress infinite, says, here by the common, as well as the civil law, ended all process for injuries unaccompanied with force. The defendant was to be cited thrice, by three *simple* citations, with an interval of at least ten days between each citation, and then a *peremptory* issued(9). And the defendant was not truly contumacious till after the peremptory was

(9) Ad peremptorium edictum hoc ordine venit, "ut primo quis petat post absentiam adversarii edictum *primum*, mox *alterum* per intervallum non minus decem dierum, et *tertium*, quibus propositis tunc *peremptorium* impetret. In peremptorio autem comminatur is, qui edictum dedit, etiam absente diversa parte cognitum se, ad pronunciaturum. Nonnumquam autem hoc edictum post tot numero edicta quot præcesserint datur. Nonnumquam post unum vel alterum; nonnumquam statim quod appellatur *unum pro omnibus*. hoc autem æstimare oportet eum qui jus dixit, & pro conditione causæ vel temporis, ordinem edictorum vel compendium moderare." Dig. lib. 5. tit. 1. from 68 to 72 inclusive. See also Heineccius, on the Pandects, part 1. sec. 281. and his Antiq. vol. 2. p. 304. and Ayliffe's Parergon Juris Canonici, p. 176.

served(10); or otherwise one only citation issued, and that a peremptory to summon the party to appear at a distance of time equal to what three simple citations should contain, and if he was contumacious a *primum decretum* issued(11), in real actions to take possession of his goods, and in personal to hold them in a sort of custody, together with the owner; and in personal actions there was also a *secundum decretum* at the end of the year, to give a *jus usucapiendi & præscribendi*; in both cases, if the defendant came in within the year, purged his contempts, and gave security to abide the suit, and paid the costs, possession was restored to him, but not afterwards.

The following clear account of the *primum & secundum decretum* is taken from Durand.

(10) *Vere contumax*, says Gothofred in his note on the 5th book Pandects 70. In our ecclesiastical courts, as in the canon law, the first citation is peremptory, so far as to make the party absenting himself contumacious, but he cannot be excommunicated till after three notices, as will be seen hereafter, but they are not like the Roman, all originals, or mere repetitions of the original.

(11) From hence the *first decree* in the court of admiralty, or provisionate decree for the possession of a ship, see 1 Ventris, 174. and Moor, 814. as I deduce the *four defaults*, technical terms known to that court, from the number of citations abovementioned; for that court has exclusively followed the civil law, while the ecclesiastical have been much affected by the canon.

Primum decretum est, proprius jussus judicis, quo mandat bona alicujus propter ejus contumaciam in pœnam contumaciæ *possideri*(12), cum actum est actione reali vel personali. Spec. lib. 2. De primo decreto.

It went at first ad omnia bona; latterly the Authenticks confined it pro rata debiti.

Quandoque interponitur primum decretum, & non secundum, *ibid.*

Per primum decretum habet missus, & custodiam & defensionem rerum, quod dicitur judiciale. Fructus capere, prædium locare potest. But there is no secundum decretum in the admiralty, for they act in rem.

Secundum decretum est secundus jussus judicis, quo jubet bona alicujus propter contumaciam *possideri*, quæ prius ex primo decreto *detinebantur*.

Locum habet solum in personalibus(13). Quia a gens personali petit sibi dari aliquid quod suum non est. Si igitur non det, utile est interponi, secundum decretum per quod sit missus dominus vel saltem acquirit jus usucapiendi & præscribendi. At is qui rei vindicatione agit, non petit rem sibi dari, sed eam, seu ejus possessionem sibi restitui, quia dicit se dominum rei, unde cum per pri-

(12) He should have added, custodiendi vel detinendi causa, for the primum decretum doth not give a firm possessory right till after a year.

(13) This is the reason, as I conceive, why there is no secundum decretum in the admiralty.

*num decretum nanciscatur ejus possessionem impletur ejus decretum.*

In *realibus transcurtus dum qui habetur loco secundi decreti, facit quem verum possessionem*(14).

Item per *secundum decretum habet creditor, cui res in solutum data est justam causam possidendi, & præscibendi sive debitor fuerit dominus rei possessæ, sive non.*

Per *secundum decretum venduntur quandoque bona :*

The person who obtained a *primum decretum*, instead of being himself *missus in bona*, might, on his petition, get the *fructus sequestered*(15) in the hands of another, as his agent, for his benefit.

The person *missus in bona*, by these decrees was so, not only for his own benefit, but that of all creditors, which bears a striking resemblance to the usage in courts of equity, where some

(14) Between these last two paragraphs there seems at first a contradiction, but they refer to different cases. The first alludes to a plaintiff having a right of property; the other to a lien or hypothecation, where, during the year, custody only is obtained. The lapse of the year answers in the admiralty the purpose of the second decretum.

(15) Hence I imagine originated the process of sequestration in chancery, though in the civil law sequestration is usually applied to putting property in dispute in the hands of a sequester, like the appointment of a receiver.

Lord Bacon, the introducer of sequestrations in chancery, knew the civil law well.

creditors seeking an account, others may come in under their decree.

We have hitherto supposed contumacy—now suppose the party to appear.

The party appearing at the appointed time, was to give security or bail to the action, and if he had a right to throw the *onus* upon some other person, to vouch him or call him in aid, which was termed *laudatio*; and here, as in every other stage of the cause, *seriæ* the intervention of a holiday, or *dilationes* allowances of time granted by the court upon just cause, might produce delay.

If the defendant, or *reus*, appeared at the proper time, but the actor or plaintiff absented himself(16), he was nonsuited. If he did not prosecute his action for a year, then at the end of that time, after three several summons, at the interval of thirty days each, he was nonprosd.

It should seem that a citation must be issued *de novo*, in any and every stage of the cause when a party absented himself; and hence Heineccius says, “*Diversa ab hac in jus vocatione, est citatio cujus jus nostrum meminit; illa enim initio litis, et semel fiebat*(17).”

(16) 112\_Novell, c. 3.

(17) Heineccius in Pandectas, part 1. De in jus vocando, and hence in the foreign ecclesiastical courts, the causes being ordinary, no sentence could pass, if the party contumaciously absented himself, though in the civil courts, where causes were summary, they might. See the *Practica*

If both parties appeared on the appointed day, each was to give security *stipulatio*, or *satisfactio*; the plaintiff, that he would prosecute his suit, and pay the costs, if he lost his cause(18): The defendant, that he would continue in court, and abide the sentence of the judge, i. e. bail to the action(19), and at this time also (though that

*Judiciaria Joannis de Arnono* annexed to Maranta's work, and the same practice introduced in our ecclesiastical courts produced infinite inconvenience, till remedied by the good sense of judges, in the manner that shall be mentioned hereafter.

(18) In like manner, saith Sir W. Blackstone, as our law still requires nominal pledges, book 3. comm. ch. 19.

(19) "Much like our special bail," says Sir W. Blackstone, "but with this difference, that the *fide jussores* were "there absolutely bound *judicatum solvere*, to see the costs "and condemnation paid at all events, whereas our special "bail may be discharged by surrendering the defendant into "custody within the time allowed by law," *ibid.* Heineccius differs, at least as to later periods, for he says, "Novo "jure reus, sive in rem, sive personali actione caveretur, "nunquam cavebat *judicatum solvi*, sed tantum *judicio* "sisti.

"Antiq. lib. 4. tit. 11."

Cautions or securities were,

Judicatum solvi ;

De Judicio sisti ;

De Rato.

By the first, the suitor engaged, if he lost his cause, to pay whatever sum he should be condemned in by the judge.

was frequently done too immediately after contestation of suit) the oath of calumny was sometimes administered.

Security being given on both sides, the plaintiff preferred his action; in ruder times, by a certain form of words, to which the defeudannt was to plead *ore tenus*; in more improved, by filing his libel, to which the defendant having first received a copy, and subscribed the time of its reception, answered in writing in due time, i. e. at furthest within twenty days(20).

The libel having been put in, the defendant either confessed the plaintiff's charge or if he could deny generally its whole truth, he did so at

By the second, he gave security to abide the sentence. And latterly, also to pay a tenth part of the sum in dispute, if defeated.

The third, engaged that a principal would confirm the acts of his proctor, or agent.

Cautions with respect to the manner in which they were taken, were,

Cautio fide jussoria, viz. by sureties;

Pignoratitia, by deposit;

Juratoria, by oath;

Nude Promissoria.

The first was the one generally in use, and called by way of eminence *satisfactio*, and is the one used in the court of admiralty on defendants appearance, in nature of bail, though sometimes a juratory caution is there admitted.

(20) See Code lib. 3. tit. 9. Novels, 53. ch. 3.

once, i. e. he pleaded the general issue, which is the strict and original meaning of contesting the suit or the *litis contestatio*(21).—If he could not make

### (21) LITIS CONTESTATIO.

This opinion is founded on the following reasons—

An exception could not make the *litis contestatio*; for we are perpetually told, that of exceptions some *must* be put in before contestation of suit, others might after, which would be absurd if they could be identified with it.

An issue joined on the truth of an exception, though it is called a contestation of suit, is properly a contestation of the exception or defence of the reus, and not of the plaintiff's suit or charge, for *lis* is the charge made by the *plaintiff*. *Litem intendere alicui*, to bring an action against some one; in *litem jurare*, to swear to the truth of his complaint; *litem capitis in aliquem inferre*, to bring against one a capital charge, are all expressions of Cicero's. Besides, the common and vulgar trite definition of a *contestatio litis* is, that it is *responsum libello*; and, as I conceive, for reasons which I shall mention hereafter, that the ancient Roman law knew nothing like special answers in courts of equity, or the personal answers of the ecclesiastical courts; the answer could be nothing but a general answer—a general confession, or a plea of the general issue.

I acknowledge, that in modern times this strictness has worn off; and in certain causes, e. g. all summary ones, no strict contestation of suit is required: the suit is, *as it were*, contested, by the next contradictory act after the libel put in that concerns the merits of the cause, or to use the words of Maranta, "Primus actus qui solet immediate fieri post "*litis contestationem*, in causis in quibus lis contestatur "*habet vim litis contestationis* in causis in quibus lis non

this denial, he put in an exception, or a defensive matter.

"contestatur;" i. e. as he observes, in *all* causes in the kingdom of Naples, they being all summary, in which *omnia substantialia judicii sunt sublata*—Part 6. de Litis Contestatione. And thus Lyndwood says, "In speciali inquisitione vocabitur is contra quem proceditur, qui si veniens responderit, habebitur *pro* contestatione."

But see whether I am not justified by authorities as to the strict and original meaning of these terms: "Per responsum ad positiones;" i. e. by a special, or what we call a personal answer, to distinguish it from the answer of the proctor. Non inducitur litis contestatio, says Gail, Observ. 73. N. 7.

"Nequaquam per exceptionem peremptoriam litis contestatio intelligitur esse facta."—Sexti Decretalium, lib. 2. tit. 3.

"Exceptionis peremptoriæ, seu defensionis cujus libet principalis, objectus ante litis contestationem, nisi de re judicata transacta vel finita, litis contestationem non impedit."—Ibid.

"Super exceptionibus non necesse litem contestari. Post litem contestatam non addi potest libello qualitas."

"Litis contestatio fit, per vel negationem, vel per confessionem, vel per verbem dubitativum; per negationem quando reus negat *simpliciter* narrata per actorem."—Maranta, part 6. de litis contestatione.

I think I can borrow aid from Sir Wm. Blackstone upon this subject, vol. III. of his Commentaries, page 296.—"Defence," saith he, "in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing* or *denial* of the

Of the characters of these pleadings—little is said. We find in general that the libel ought to

“truth or validity of the complaint. It is the *contestatio litis* of the civilians, a *general* assertion that the plaintiff “hath no ground of action.”

I have been prolix on this subject, because it may sometimes be important. In a remarkable cause, the *Office v. French*, tried before myself as vicar-general of Kildare, a question arising whether additional articles could be put in, the impugnant having answered those original, it was, among other arguments against so doing, insisted by very able and learned men, and said, though I thought erroneously, to be supported by a great living authority, that no addition, alteration, or amendment, could be after contestation of suit, that the suit had been contested, and that every *responsum libello*, and even an *exception*, formed a contestation of suit.

I was of opinion that in this case, which was a criminal summary proceeding, there could be no *litis contestatio*, in the strict sense of the word; but that, even if there could, an answer to articles did not make one, but was only, as Lyndwood says above, *pro contestatione*—that the rule as to amending or adding being now a mere arbitrary one, no longer founded in reason, since the *canon law*, a stranger to juries, had fixed the same judge for matters after as before contestation, it should be construed strictly with reference to the strict original meaning of the terms *litis contestatio*—and even that admitting this answer to be a contestation of suit, the old rule, which forbade subsequent amendment or addition to the *libel* or articles, had nothing whatsoever to say to *additional* articles or allegations, for reasons which shall be mentioned presently.

The *litis contestatio*, by which, says Mr. Erskine, a judicial contract is understood to be entered into between

contain a *narration* and *conclusion*, to be *short*, and contain nothing superfluous—*clear*, so as to avoid all ambiguity—*apt*, i. e. that the prayer for relief should accord with the nature of the grievance, and sufficiently *certain* as to the quantity, quality, and nature of its subject matter.

From the accuracy, which as we shall presently see was used in *inscriptiones* or indictments, we may suppose it was not neglected in these declarations.

### EXCEPTIONS.

It has been observed, that if the defendant could not contest the libel generally, i. e. plead the

the litigants, is of so much consequence in the Scotch law, that even an action arising *ex delicto* is thereby perpetuated against heirs.—Erskine's Institutes, ch. 3. sec. 1. 33.

To conclude, all the commentators, and Lanfranck and other books of practice, say that *responsum positionibus*, or a personal answer, is not a contestation of suit; and who ever heard that an answer in chancery was a joinder of issue?

In common parlance, denying the truth of the defendant's exception, or indeed wherever parties come to a direct affirmation on one side, and denial on the other, is called a contestation of suit, and is sufficient to satisfy the rule, that in all plenary causes there must be contestation of suit, because the defendant by excepting becomes a *quasi* plaintiff. *Reus excipiens actorem agebat*, says Heineccius, in Pandectas. *Qui exceptiones opponit actoris portibus fungitur*, Mascardus, vol. i. quæst. 17. 4. *In exceptionibus reum partibus actoris fungi oportere*, Dig. 22. 3. 19.

general issue, he must put in an *exception* or a *defensive* matter.

Exceptions were either *peremptory* or *dilatory*, the first barring, perempting, or destroying the plaintiff's suit or cause of action; the latter postponing or delaying him.

To the former the civilians add the epithet of *perpetual*, to the latter of *temporary*: perhaps not with perfect accuracy, since a perpetual bar may sometimes be pleaded in the shape of a dilatory; or, to use our own technical phrase, the same plea may sometimes be pleaded, either in abatement or in bar, e. g. outlawry: and besides a plea which is only dilatory as to bringing another suit, may be perpetual and peremptory as to the present.

To explain exceptions, we must understand that if the defendant could allege any thing by which the action, that in strictness of law accrued to the plaintiff, could be excluded, evaded, or escaped, on grounds of law or justice, though it was not, in strictness of speech, taken away, he did it by way of exception: thus if he could *demur*, it was called an *exception*; so if he pleaded in bar *exceptio doli mali*, that the promise had been obtained by fraud, or *pactum de non petendo* a release, or *jusjurandam de non agendo*, a covenant of the plaintiff that he would not sue; all these pleas, though they dissolved the natural obligation of the defendant, did not dissolve the civil obligation *ipso jure, sed ope exceptionis excludebant*.

Such were also the exceptions *litis finite, rei*

*judicatæ* and *transactionis* of a former final determination on the same point between the same parties(22), and of a compromise since the suit began.

If the plea was of a matter which took away the plaintiff's action *ipso jure*, such as a plea of payment or satisfaction, it was called *defensio* a *defensive matter*, and not properly an exception; for *exceptio* was "*actionis jure stricto competentis ob æquitatem exclusio*(23)."

These distinctions being well understood, it will clearly appear why *dilatory* exceptions (among which are to be reckoned those *inepti libelli*, or *demurrers for want of form*) could not be admitted after contestation of suit, unless they had subsequently come to light—why some *peremptories*,

(22) *Res judicata* is when it is beyond the reach of appeal or revision.

(23) See Heineccius ad Instituta, lib. 4. tit. 13. *Proprie dicitur exceptio quando actori competit actio, quia est actionis exclusio, quando autem actori nulla actio competit, id quod opponit reus proprie vocatur defensio*. Lanfranci praxis, ch. 4. de exceptionibus. But by modern jurists the latter are called exceptions of fact, to distinguish them from the others, which are called exceptions of law; for, in its most extended sense, the word *exception* included both, and was *omnis rei allegatio ac defensio qua intentio actoris vel ipso jure vel ob æquitatem eliditur*.

Baldus seems to understand *defensio* in a different sense, when he says, "*Omnis allegatio declinatoria aut dilatoria est defensio*."

such as those, *litis finitæ*, took away the necessity of any contestation of suit; for they did not respect the merits of the cause(24), but enabled the defendant to slide away from the action, and repelled the plaintiff at the very threshold, since they were in truth reasons why the defendant was not obliged to answer the plaintiff's charge at all; and why the rest, called simply *peremptories*, whether answering to demurrers for substance or pleas in bar (for the civil law made no distinction, whether the objection appeared intrinsically on the plaintiff's own shewing, or was suggested first by defendant, but called it indifferently a peremptory exception) might be put in at any time before contestation of suit(25).

(24) *Merita causæ non respiciebant, sed actionem elidebant, et actorem a limine judicii repellebant*, are the words of the civilians and canonists.

These exceptions *litis finitæ* quæ impediunt litis ingressum are, according to Maranta, of four kinds.—*Jurisjurandi—rei judicatæ—transactionis—and præscriptionis*. They sometimes, however, were not considered as declinatory, or perempting the plaintiff's entrance upon his action, and might be opposed after contestation; and sometimes the judge was not satisfied about them, and so the cause went on, and they were reserved to the hearing. "*Istæ exceptiones peremptoriæ aliquando requirunt altiore indaginem. quo casu judex debet eas reservare, et procedere ad ulteriora.*"—See for all this, Maranta, pars 6. de exceptione, n. 12, 13, 14.

(25) They might, however, be proved after; and in actions *bonæ fidei*, where forms were little attended to, might

If they answered to pleas in bar, it doth not seem so plain what is meant by saying that such peremptory exceptions were to be put in before contestation of suit, or how they could admit of it, since he who pleaded a special plea was not called upon to plead the general issue, or perhaps could not do it without contradiction: by contestation of suit then, in this case, must be meant an affirmative contest, which would consolidate with the exception (as e. g. true it is that I assumed but you have since discharged me)(26), or perhaps it is meant that the defendant might plead double, the general issue and a special plea, where they were not inconsistent. To say that it means that the exception must be put in before itself was contested, would be an unnecessary truism.

Several exceptions might be put in one after the other, unless it appeared evident that the de-

be put in after contestation of suit. Some peremptory exceptions were so far privileged, that they could be put in even after sentence. Such were those of the *senatus consultum Macedonianum* & *Velleianum*, which may be translated pleas of minority and coverture, as to suretyships or securities.

(26) And thus Heineccius in *Pandectas*, part 2. sec. 32. seems to explain it. He says, *Reus vel narrationem facti veram esse concedit, petitionem tamen actoris exceptione peremptoria elidit, vel facto et petitioni pure contradicit; priore casu litis contestationem affirmativam, posteriore negavam esse dicant.*

sendant was designedly endeavouring to delay justice, and to overpower his adversary with delay and expence, a liberty which has been perhaps wisely taken away in some of the modern continental courts(27).

Besides the distinction of exceptions into dilatory and peremptory, they were also divided into civil and prætorian, e. g. the exception *de pacto* that the creditor had agreed not to sue was not a legal plea, for it was *nudum pactum*, and the debtor remained bound; it was admitted therefore only by prætorian equity.—See Inst. 4. 13. 3. Another distinction was into *nominate* and *innominate*, the latter arising *ex facto incidenti*, and called exceptions *in factum*. Another distinction was taken from the individual objects of each exception.

(27) In the Imperial Chamber, all exceptions within the party's knowledge must be put in at one and the same time, Corvinus, lib. 2. ch. 30. Quere, whether such a regulation would not be useful in our own courts, where a succession of demurrers, for want of form surely, often occasion a mockery of justice? Nor doth there seem to be much reason why the client should be made to pay more than once for the instructions given by experience to a young barrister in good pleading.

It must be admitted, that the old practice was like the present. "Reus," says Baldus, "nequaquam aretatur ad unam exceptionem, favore defensionis; etiamsi lis esset contestata super ea, tamen potest eam emendare, & cumulare alias." So, he observes, upon an appeal also, after suit contested, he may still put in one or more exceptions.—Baldus in 7 um. Codicis de Appellationibus.

The defendant having pleaded, the plaintiff replied, and defendant might rejoin under the name of duplicatio; and so they might carry on the pleadings to a sur-rejoinder and rebutter under the name of triplicatio and quadruplicatio(28); but in well-regulated tribunals the parties were seldom suffered to go beyond the duplicatio.

When, in this course of pleading, they came to a point which was affirmed on one side, and denied on the other, they were then at issue, as with us; and this contradiction was also (though, as I have said(29), I think not according to the strict and original usage), called a contestation of suit; so that in a looser sense the suit was contested whenever they came to some point of fact, that was then ready for trial, or, as Heineccius says, *ubi judex datus est*, when the prætor was ready to send the cause to the jury. From this time, *strictly* speaking, the cause was said to commence, though in a more lax sense it commenced with the citation.

After contestation of suit, no change or alteration could be admitted in the libel, e. g. it could not be changed from a petitory to a possessory

(28) These Latin names were actually given to our pleadings in the early times of the English law.—See Inst. 4. 14. Bracton, lib. 5. Tr. 5. ch. 1. Black. Comm. ch. 20. p. 310. Quotcunque vero allegationes concedent leges & judices, semper reo ultima allegatio competit.—Hein. pars 6. 361.

(29) See Heineccius, or the 5th book of the Pandects, part 2. sec. 31.

claim. The proctor became *dominus litis*, and could make a substitute, and could not be revoked without cause—this was the regular time for administering the oath of calumny; for he cannot be said *calumniari, qui iudicium nondum suscepit*(30); and lastly, as has been said, it was too late to put in any dilatory exceptions, and many of those peremptory were also by it excluded from being subsequently proposed.

The suit being fully contested, matters were no longer transacted in *jure*, but in *judicio*; the cause went from the prætor to the iudices, or, in other words, it was ready for trial(31): the

(30) See Gail, lib. 1. Obs. 34. See also the Code 2. 53. De juramento propter calumniam dando. In some respects the iudicium was said to begin from the citation; particularly in one which possibly might have thrown some light from analogy on a question much agitated not long since in the Irish court of exchequer, in *Swan v. O'Donnell*, where, upon appeal, it was first determined that the subpoena was not the commencement of a suit so as to prevent statutes of limitation from running, and afterwards by the house of lords that it was.

By the civil law, the mere citation was sufficient to interrupt prescription and limitation. See Gail, as above, and the commentators quoted by him on the Code upon these subjects.

(31) Heineccius's account of the matter in his *Antiquities*, shews clearly how much they were a jury:—"Prætor," said he, "*de jure cognoscebat, decernens, quid jure sit pronuntiandum si actor intentionem suam pro-*

judices then were sworn(32), and if the party disapproved of any of them, such persons might be challenged and set by even, as I conceive, without shewing cause(33).

“basset: *judex* deinde de *facto* dispiciebat, utrum actor “*actionem suam an reus exceptionem possit demonstrare.*” Si juris tantum esset quæsto prætor solus *extra ordinem* cognoscebat. Is not this a description of the different provinces of a judge and jury?—See Heinec. Antiq. lib. 4. tit. 7. and Gerard Noodt. l. 8.

(32) *Sic scituri*, says Justinian, *quod non magis alios judicant quam ipsi judicantur.*—Code 3. l. 14.

(33) As the jury, however, seem to have been struck at an earlier period, so the challenges or recusations seem to have been before contestation of suit, like the striking of a special jury; for the Code says, lib. 3. tit. 2. 16. *Aper-tissimi juris est, licere litigatoribus judices delegatos, antequam lis inchoetur, recusare*—unless *lis inchoetur* may here mean going to trial, or examination of witnesses.

This *recusatio judices*, which in my opinion meant nothing more than the challenging of a jurymen, has been spoken of, by authors in general, as if it was a power of refusing or declining the jurisdiction of the court itself, on account of objections to the person of the judge of the bench; and such is the consequence of ambiguity of words, and of the false translation of the term *judex*, that in the early periods of our own law, Bracton and Fleta say that a judge may be refused for a good cause; though now, says Sir Wm. Blackstone, the law is otherwise, and it is held that judges and justices cannot be challenged, and the same holds, I conceive, of judges ecclesiastical.—Comm. book 3. ch. 23. And the civil law is not speaking of *judices ordinarii*.

## EVIDENCE.

All things being ready, the party went into proof: proof was distinguished into *full* and partial, or *semi-plene*. Full proof consisted in confessions, testimony of witnesses, public written instruments and deeds, oaths, and presumptions. The *probatio semi-plena* was made by one witness, by private books of account, by common fame, and by comparison of hand-writing. Mascardus subjoins to these two species of proof, signs and conjectures(34). The conjunction of two half proofs, of course produced a *plena probatio*.

I never heard of such an attempt in modern times to recuse ecclesiastical judges, but Ayliffe, in his history of the University of Oxford, mentions an instance, and the judges in Scotland, e. g. those of session may be declined for good cause. See Erskine's Institutes, book 1. sec. 13.

(34) See for the whole of the above divisions, Mascardus de probationibus, lib. 1. Wood's Civil Law, p. 310, &c. I have not inserted *notoriety*, which is rather considered as superseding the necessity of all proof, because its limits are too vague to afford any rules for saying where a judge shall pronounce a thing to be notorious; some cases are plain, e. g. it would be absurd to ask for proof, that there was a civil war in England, in the reign of Charles I.\* Mascardus also gives a chapter on the *evidentia facti*, as if a thing happened in sight of the court; but this is not properly *probatio*, it supersedes its necessity, and is like our trial by inspection.

\* Quæ vel nemo negat, populo vel teste probatur,  
Vel se subiiciunt oculis, notoria dicæ.

LYNDWOOD.

The essential rules of evidence will be the same among all nations governed by reason, as that no man shall be a witness in his own cause(35),—that in every issue the affirmative is to be proved(36),—that hearsay is no evidence(37), while the technical rules, e. g. such as respect the number of witnesses, or the mode of their examination, may infinitely vary.

*Confessions.* This word confession, though sometimes applied to voluntary acknowledgments in a civil case, is generally used by the civil law as it is by us, with reference to crimes. The confession must have been voluntary, neither extorted by fear, nor induced by hope or promise of pardon, nor could it affect any but the party himself, and to make full and conclusive evidence it must be made in a court of justice(38),

(35) Omnibus in re propria dicendi testimonii facultatem jura submoverunt, Code 4. 20. 10. Nullus idoneus testis in re sua intelligitur. Dig. 30. 10. 10.

(36) Ei incumbit probatio qui dicit non qui negat, Dig. 22. 3. 2. Non possessori incumbit necessitas probandi possessiones ad se pertinere, Code lib. 4. de probationibus, as with us in ejectments.

(37) Testes rationem *scientiæ* reddere tenentur: non admittuntur *ex fama* dicentes testimonium. See Heinec. in Pandectas, vol 1. part 4. sec. 143.

### (38) ANSWER OF DEFENDANT.

It may appear odd that I do not here, under this head, annex some account of the personal answer of the defendant in the civil law, from which answers in equity are sup-

for otherwise it was only extrajudicial discourse, which amounted but to half proof, provisions

posed to be derived; but in truth I can find no clear account of any such mode of proceeding in the civil law, and almost begin to suspect that it did not exist but in the designing imaginations of the Canopists. The authors who speak of it as the mode of the civil law, such as Wood and Ayliffe, refer to authorities which do not support them, which indeed they frequently do in other cases.

They generally refer to interrogatory actions, or to the eleventh Book of the Pandects, tit. 1. de Interrogationibus. But interrogatory actions were confined to a few cases, and particularly introduced to discover to what share of the *As* or inheritance the defendant was entitled, because if the plaintiff came upon him for more than his share, he was nonsuited; it being a principle of that law, in actions *stricti juris*, like the rule in our action of debt, that if he went for more than was due, he failed in his action; it was therefore a bill of discovery, to lay the foundation of a future action; and when the same Pandect says, "*hodie autem interrogatoriis actionibus non utimur. Nemo enim de jure suo ante judicium respondere cogitur,*" though it may be implied, that he was forced to answer in *judicio*, yet it may fairly be inferred, that it was only as to such matters, and they were a few enumerated, which had formerly been the subjects of interrogatory actions. Heineccius properly observes, in his comment on this book of the Pandects, that these had no similitude to personal answers. "*Huc non pertinent positiones, quæ hodie ab actore respectu actionis offerri solent, eum in finem, ut præstito jurejurando, adversarius ad singulas categorice respondeat, illæ enim interrogationes ad instruendam actionem, hæ probationis suscipiendæ causa inventæ.*"

Wood, in speaking of the oath of truth says, it is when the plaintiff or defendant is sworn upon the libel or allega-

very similar to our own; but to a solemn confession at the point of death, more attention was

tion, to make a true answer of his knowledge as to his own fact, and of his belief to the fact of others. One would imagine, as to the defendant, that this was a description of an answer in equity, but it is not: the oath of truth was an oath taken by a party as to the value of a thing, to which no other proof could be brought, but it was not decisive like that to which the other party referred, and agreed to be bound by it.

What is said of the necessary oath in the twelfth book of the Pandects, seem to connect much nearer with the point, but that is said by Ayliffe and Wood to mean only what is well known by the name of the *suppletory* oath, or rather it had the meaning explained in the next page, and certainly was unlike our personal answers.

The Code saith, *Detestibus*, lib. 4. 20. 7. "*Nimis grave est quod petitis urgeri partem diversam ad exhibitionem eorum, per quos sibi negotium præbet. unde intelligitis quod intentiones vestræ propriæ debetis affere probationes, non adversus se ab adversarii adduci,*" however, though this seems to indicate a general principle, yet as it refers particularly to the production of witnesses, I cannot argue from it.

Without saying that personal answers were unknown to the Romans, (and it is observable that Judge Blackstone only says, they were borrowed from the ecclesiastical courts), I shall only add, that I have not found any specific head upon them, and therefore have not introduced them into the text. The treatises on the practice of equity courts, which compare our answers to the Roman, evidently confound the plea of the general issue with a personal answer, as, in common parlance, whatever the defendant says may be called an answer to the plaintiff. There is no title *de*

paid, and it might, by the aid of circumstances, amount to a full proof like a judicial confession.

It is curious to observe, how in speaking of confessions, the civil law takes the same precau-

*responsis* in the corpus, C. L. and one only *de interrogatio-nibus*, and that is inapplicable.

Personal answers I imagine were not known till *positions* were introduced, and that was by the Canonists, and not till the time of Gregory the Ninth; so say the Commentators, when commenting on that passage of the Clementine Constitutions, mentioned below. There was, it is true, a *necessary* oath, which might be imposed on the defendant, if he denied the debt, for in the Pandects, lib. 12. sec. 34. it is said, *Ait prætor cum a quo jusjurandum petitur, solvere, aut jurare eogam*, but this was a *general* oath of denial, not a special answer to positions or interrogatories; and besides, this oath was only administered by the prætor, where the plaintiff not having proof, offered to rest on the defendant's oath, and might be avoided by the defendant's saying to the plaintiff, You know more of the circumstances—I will leave it to your oath.

It is true, the judge, as appears from 11 Dig. 1. 21. might interrogate. *Ubicunque judicem æquiles moverit, æque oportere fieri interrogationem dubium non est*, but this was not the questioning by the party, and perhaps was confined to such matters as had been the subjects of interrogatory actions.

There seem to be the most direct authorities for my opinion in the Clementine Constitutions, lib. 5. "De *verborum significatione*, tit. 11. cap. 2. where it is said, "Positiones ad faciliorem expeditionem litium, propter *partium confessiones*, & articulos ad clariorem proba-

tions with our courts of equity, that the admission of one fact shall not take away the necessity of proving a *distinct* fact insisted upon by the way of avoidance, as where one confesses that he killed Titius in his own defence, the admission of killing doth not take away the necessity of proving that it was in self-defence. But if it be *one* fact, as if on a charge of receiving 100l. it is answered, yes I did, which you owed me; the whole confession must be taken together. See Wood's Civil Law, 311.

*Witnesses.* Much time is spent by the Civilians and Canonists in comparing the authority of written and oral testimony, i. e. of records or deeds, and depositions taken down from oral testimony.

One famous Canonist(39) is such an enemy to parchment, that he ridiculously laughs at the credit paid to the hide of a dead animal, while others, considering the fallibility of witnesses, and uncertainty of memory, prefer written evidence ;

"tionem *usus longævus* in causis admisit." And in Heinecius, in Pandectas, pars 2. 42. "*Postquam enim litis contestatio explicita & specialis ad singula capita libelli in foro passim penetravit;*" which quotation, though it may seem to contradict my notion of the *litis contestatio*, proves his opinion, that special answers were of a later date.

(39) The Abbas Parnormitanus, a very celebrated author in former times, and who is not unnoticed in some of our old reporters, for instance, by Sir John Davies, in the case of the dean and chapter of Ferns.

and Mascardus, with much labour, endeavours by a distinction to reconcile the parties. See Mascardus de Probationibus, vol. 1. questio 6 a.

The first requisite upon producing witnesses was to have them sworn; and this is particularly required by the Code, lib. 4. tit. 20. 9. *Jurisjurandi religione testes cogi, priusquam perhibeant testimonium jamdudum præcepimus.*

No man could refuse to give his testimony after being properly cited, whether in a civil or criminal case; but the person at whose request they were summoned was obliged to allow them the reasonable expences of their journey, if they came from distant parts; and, in extraordinary cases of illness or old age, they might be examined at their own places of residence(40).

But though, in general, no man could refuse to give testimony, save in certain excepted cases of relationship, yet many orders of men were of course excluded from giving testimony in any cause whatsoever. “*Quidam propter reverentiam*

(40) *Constitutio jubet non solum in criminalibus judiciis, sed etiam in pecuniariis unumquemque cogi testimonium perhibere de his quæ novit cum sacramenti præstatione, vel jurare se nihil compertum habere.*—Code 4. tit. 20. de testibus, l. 16.

*Testes non temere evocandi sunt per longum iter, & multo minus milites evocandi a signis vel muneribus, perhibendi testimonii causa.*—Dig. lib. 22. tit. 5.

*Omnibus autem testibus sine damno & impendio suo, &c.* Code 4. 20. 16.

“personarum, quidam propter lubricum consilii, “alii vero propter notam & infamiam vitæ suæ “non admittendi sunt ad testimonii fidem,” say the Pandects, 22. 5. 3. 5.—to which must be added the ground of interest, while others were excused for multifarious reasons from attending in court at least.

The *reverentia personarum* seems to have excused some persons of the highest orders from being summoned into a court of justice, for instance bishops (41); and this phrase also sometimes respects the persons concerned in the trial: thus the freedman could not be a witness against his former master, or that master’s wife, from the respect due by him to their persons.

Under this head may perhaps, with propriety, be placed the excusation of persons on account of relationship, which was carried to a very extra-

(41) Nec honore nec legibus episcopus ad testimonium dicendum flagitetur. item dicit Theodosius, episcopum ad testimonium dicendum admitti non decet, nam & persona oneratur, & dignitas sacerdotis exempta confunditur. Sed iudex mittat ad eos quosdam de suis ministris, ut *propositis* sacrosanctis evangeliiis, secundum quod decet sacerdotis, dicant ea quæ noverint, non autem jurent.—Code, lib. 1. tit. 3, 17.

So by the canon law, the gospels were set before the bishop *proposita*, but he need not kiss the book.

Yet, in general, magistrates might be forced to give testimony, and even the prætor, in a cause of adultery, which shews the peculiar indignation at that offence.

ordinary and absurd degree, as may be seen in the note(42), and in one instance, as to parent and child, amounted to absolute exclusion; and the right of the client to prevent his advocate or proctor from revealing the secrets officially entrusted to him, may be classed under the same head.\*

The *lubricum consilii*, or want of discretion, excluded infants and those under age of puberty, unless they were *pubertati proximi*; and in criminal cases, no person under twenty years of age was admitted to give testimony. I need not say that idiocy or insanity was even a stronger objection. Some have doubted, though without cause, whether women could be witnesses in any court(43), on account of the weakness of the sex. It is impossible that the wisdom of Rome should have put such an absurd affront on their understandings.

The *nota* related to persons *in vinculis*, the *infamia vitæ* to all persons rendered infamous by

(42) "Nec cogendum aliquem testimonium dicere ad-  
versus socerum, generum, vitricum, privignum, sobrinum,  
sobrinam, sobrino natum, eosve qui priore gradu sunt."—  
See Heineccius in Pandectas, vol. i. p. 453.

"Parentes & liberi invicem adversus se nec volentes ad  
testimonium admittendi sunt."—Code 4. 20. 6.

(43) With respect to wills, says Dr. Taylor, their testimony was not admitted, because the sex was excluded from those solemnities with which wills were made—but where their testimony was a matter of evidence, there seems no good reason for rejecting it.—See Ellis's Summary, p. 120.

their crimes and punishments; to women of abandoned character; to infidels, apostates, and heretics; and even the slave and the beggar, though not branded with infamy, were from the vileness of their condition incompetent, while any other evidence could be had(44).

The objection of interest excluded not only near relations, but even intimate friends or mortal enemies(45), or any person who had before given testimony against the party(46). A fortiori, the common objections of interest, rendered a witness incompetent.

Persons excused from attending in court, and who had the privilege of being examined at home, or where they resided at the time, were very old men, soldiers on service, public ministers or magistrates abroad on the service of their country, and other persons whose attendance was rendered

(44) We cannot read without horror such passages as the following: "*Si ea rei conditio sit, ubi harenarium testem personam admittere cogimur, sine tormentis testimonio ejus credendum non est.*"—Pandects, lib. 22. 5. 21.—and again, "*Tormentis subjiciendi si plebei sint.*"—Code, lib. 4. 20. 15.

(45) See Code de testibus, lib. 17. Wood quotes to this, D. 22. 5. 3. but there is no such authority there.

(46) This extravagant position is found in the Pandects, lib. 22. 5. 23. "*Produci testis is non potest, qui ante in eum rem testimonium dixit.*" Heineccius reasonably thinks that the reading should be in eam rem, to the same matter.

impracticable by foreign imprisonment, or other situation.

Having thus enumerated the persons excluded or excused from giving testimony, I proceed to estimate the weight to be given to the evidence of those who were legally admitted: this depended of course on their number, their integrity, their skill, the consistency of the circumstances, and the contrariety of evidence.

The number of witnesses was to be moderated and regulated by the good sense and prudence of the judge; but it was the well known rule of the civil law, that at least two were required(47).

The considerations respecting the integrity of the witnesses, the regard to be had to the consistency of circumstances, or *negotii qualitas*, and the rules for balancing opposite testimonies, are dilated upon in the twenty-second book of the Pandects, for

(47) "Judices moderentur & eum solum numerum testium quem necessarium esse putaverint evocari patiantur, ne effrænata potestate ad vexandos homines, superflua multitudo testium protrahatur."—Pandects, lib. 22. tit. 5. 1. "Ubi numerus testium non adicitur, etiam duo sufficiunt, plurium enim elocutio, duorum numero contenta est."—Ibid. 12.

"Sanximus, ut unius testimonium nemo judicum in quacunque causa facile patiatur admitti, et nunc mani feste sancimus, ut *unius* omnino testis responsio non audiatur etiamsi præclaræ curiæ honore præfulgeat."——Code 4. 20. 8.

which I must refer the reader to the note below, (48).

After the qualifications of witnesses, and the weight of their testimony, our next consideration is the manner in which they were examined. Common opinion has always made this to be in secret, by depositions taken down in writing by an examiner, like the mode in our ecclesiastical and

(48) "In testimoniis dignitas, fides, mores, gravitas examinanda est," D. 22. 5. 2. "Testium fides diligenter examinanda ideoque in persona eorum exploranda erunt in primis conditio cujusque, utrum quis decurio, an plebeius sit et an honestæ inculpatae vitæ, an vero notatus quis et reprehensibilis, an locuples vel egens, ut lucri causa quid facile admittat vel an inimicus ei pro quo testimonium."—D. 5. 3.

"Si testes omnes ejusdem honestatis et exestimationis sint, et *negotii qualitas* et judicis motus cum his concurrat, sequenda sunt omnia testimonia; si vero ex his quidam eorum aliud dixerint, in impari numero, credendum est id quod naturæ negotii convenit, et quod inimicitiae aut gratiæ suspicione caret, confirmabitque judex motum animi sui ex argumentis et testimoniis et quæ rei aptiora et vero proximiora esse comperuit; non enim ad multitudinem respicere oportet, sed ad sinceram testimoniorum fidem, & testimonia quibus potius lux veritatis adsistit."—Pandects 22. 5. 21.

"Qui falso vel varie testimonia dixerunt vel utrique parti prodiderunt, a judicibus competenter puniuntur." *ibid.* 5. 16. "Qui falsa in testimoniis protulerit, primum quidem de perjurio, deinde de falsi crimine convenitur."—Code 4. 20. 13.

equity courts ; yet there is the strongest reason to suppose that this was not the principle or practice of the civil law until the latest periods of Rome, and the distorting comments of the canonists shew how much they were puzzled to torture expressions the most simple to their oppressive purposes(49).

(49) That in the time of Quintilian, witnesses were examined *viva voce* in open court, must be apparent to every reader. All that he says about their cross examination would be nonsense upon any other supposition. I should suppose, from the words of Adrian in the Pandects, lib. 22. tit. 5. 3. that the same was the practice in his time, where he says, “*Testimoniis apud me locus non est—testibus non “testimoniis esse credendum—ipsos testes interrogare soleo.*” But this commentators interpret to mean only that the depositions were not to be taken at a distance, but the witnesses brought up to the judge, to be by him still secretly examined. In like manner they construe the words of the Novels. 90. chapter the last, which says, “*Testium production non nisi præsente fiat adversario,*” to mean only, that the parties must be present at the *production* of the witnesses, not at their *examination*. But Heineccius seems to me to be of opinion that these are all forced constructions, when he says, *Hodie tamen partes quidem præsentes sunt testibus jurantibus, sed ubi examen instituitur secedere jubentur. Qui error pragmaticorum partim ex male intellecto textu, lib. 14. Code, tit. partim en prava versione Novels, 80. Cap. ult, ubi verba, Καὶ ἀκούσαι τῶν μαρτυρῶν vertunt ut videant jurare testes, partim ex canonico jure natus videtur.* See Hein. on 22. lib. Pand. tit. 5. sec. 132. And again in his Antiq. lib. 4. tit. 17. sec. 16. *Audiebantur testes non remotis partibus ceu hodie fieri solet ex mala*

The witnesses might be produced and examined three times; but their production a fourth time was not allowed unless upon very peculiar circumstances and occasions, for after three examinations publication followed(50).

*Public written instruments.*—Such were the public acts perfected by magistrates—the censors tables—the public accounts—the archives of the state—instruments attested by public notaries.—In short, whatever rested upon public faith and authority, and such documents were deemed superior to any living witness(51).

*Oaths.*—Oaths were *voluntary, necessary, and judicial*—the first require no explanation; the second were imposed by the judge upon one party at the request of the other, the latter agreeing to

intellecta Zenonis constitutione, lib. 14. Codicis de testibus. Where *secretarium*, meaning a court, was mistaken for a secret place. And again, in the same place, Heineccius says, “Romani producentem testes semper adesse patiebantur ut eos interrogaret, qua in interrogatione præcipue elucebat oratorum solertia.” But how will Heineccius get over such expressions as these? “Si testes producens *editionem* nondum acceperit, neque testationes, *perlegerit*.” Novels, 90. cap. 4.

(50) See novels, 90. whose title is, “Ut cognitis testimoniis, quartæ productioni testium locus non sit;” from hence our three probatory terms—possibly our three allegations.

(51) Censuræ & monumenta publica, potiora testibus esse senatus censuit.—Pandects 22. 3. 10.

be determined by it; i. e. the plaintiff or defendant said, I will give up the point if my opponent will swear to his cause of action: but this, as I have observed, is evidently and totally unlike a special personal answer. Judicial oaths were imposed by the judge of his own mere motion. The last comprehended the *suppletory*(52), administered to him who had made but half proof, and the *purgatory* to him against whom presumptions and circumstances militated. The oath *ad litem* must be added, when there was no question about a cause of action, but only about the value of the thing sought, which if it had been lost through the fault of the defendant, was estimated at its real value by the *oath of truth*; if by his *fraud*, at more than its real value, by the oath *adfektionis*.

*Presumption.*—We are somewhat startled at seeing presumption ranged among full proofs; but this could be meant only of such forcible presump-

(52) I must observe, that Burn and others style these differently, calling the suppletory the *necessary* oath; and what I with Heineccius have called the *necessary*, they style the *voluntary* or *decisive* oath. Both of these were taken by the plaintiff, and were subdivisions of the *jusjurandum in litem*. See Heineccius in Pandectas, part 3. sec. 49. Yet this oath of truth has been strangely defined in modern times to mean quite a different thing, probably to justify the demand of personal answers. Thus Oughton defines it, "*Quod subeunt testes de vere respondendo de positionibus.*" Tit. 110. in a note.

tions as admitted no proof to the contrary(53): such were called *presumptiones juris & de jure*. Where it admitted of contrary proof, and was drawn from circumstances not *necessarily*, but only *usually* attending the fact, if it was induced by the law always presuming it; as for instance, that every man was innocent till the contrary was proved, it was called simply *præsumptio juris*; if it naturally originated in the mind of the judge, it was called *præsumptio hominis*: for example, the judge must presume that every father would have an affection for his child, and *vice versa*, that the presumption was against a charge of parricide until proved.

*Half proof*.—Though a single witness made but an half proof, yet there were exceptions to this general rule, as if in cases of great difficulty no other evidence could possibly be had, or in unimportant causes, or where the witness was of very extraordinary rank or character(54): and, on the other hand, sometimes a private writing was no evidence

(53) Such Sir Wm. Blackstone, who here has copied from the civil law, calls violent presumptions, Comm. vol. III. ch. 23, p. 371, though he is corrected by Dr. Christian, who holds that proof may be admitted to repel all presumptions whatsoever. See his note *ibid*. See much illustration of our doctrine of presumptions, Cowper's Reports, pages 102. 110. and Fonblanque, vol. I. p. 319.

In a late case in Ireland between the vicar and parishioners of St. Andrews, Dublin, this doctrine was fully gone into.

(54) Maccardus de probationibus, lib. 1. quæ. 11.

at all, as for instance, on behalf of the writer or party himself, unless produced by his adversary; though now, says Heineccius, in Germany, a merchant's books of accounts rightly and duly kept, authenticated and produced, shall entitle him to have the suppletory oath administered to him(55): and in general, where half proof has been made, the suppletory oath, or oath of the party, is to be superadded to make full proof, (56).

The defendant, if he had cause during all these proceedings, might have *reconvened* the plaintiff, i. e. filed his cross bill or libel against him, and then both suits would have gone on *pari passu*: if he had no such ground, or had neglected it, his only remedies after sentence were *restitutionem in integrum petere*(57), *actorem calumniæ postulare, judicem falsi aut repetundarum postulare, vel denique interponere appellationem*.

(55) Heineccius in Pandectas, pars. 4. sec. 134.

(56) The case of Williams v. Lady Bridget Osborne is universally known. See Strange, 80. Burn's Ecclesiastical Law, vol. III. p. 90. I have known within my own practice the suppletory oath demanded by a husband, who could produce no other proof of the marriage but his wife's letters.

(57) I have defined the *in integrum restitutio* too narrowly ch. 20. vol. i. It is thus described in the fourth book of the Pandects, title the first—"Sub hoc titulo prætor hominibus "vel lapsis, vel circumscriptis subvenit, sive metu, sive "calliditate, sive ætate, sive absentia, sive errore."

*Appeals.*—Reserving a more full consideration of appeals for another place(58), I shall only take notice here, that appeals lay in all cases, criminal as well as civil(59),—that an appeal interposed by one, operated for all his fellow-accused—that no appeal lay from an interlocutory, unless it had the force of a definitive sentence, or induced a *damnum irreparabile*(60)—that appeals were to be carried not *per saltum*, but *gradatim*, to the next superior judge(61)—that appeals might be interposed viva voce, or in writing, and apostles or letters dismissory were to be demanded within thirty days—that nothing was to be attempted by the judge below pending the appeal,—he must transmit all documents and necessary papers—that the judge *ad quem* was liable to great penalties if he did not receive the appeal—and that the appeal must have been interposed within four days after sentence, and prosecuted and finished within a year, which was called *primum fatale* ; but sometimes a second year, called

(58) See the Practice of the Canon Law.

(59) So says Heineccius—Wood says, only in *some* criminal ; but the words of the code, 7. 62. 14. and 29. are general, except the cause was tried before certain great officers, as the Comes Orientis, or Prefectus Augustalis.

(60) Hence the same rule in the admiralty, which is peculiarly governed by the civil law ; otherwise in the courts ecclesiastical.

(61) We shall see presently how and why the canon law departed from this rule.

*secundum fatale*, was allowed; this was called, *terminus juris*: but generally a shorter time was appointed by the judge for prosecuting the appeal, which was called, *terminus hominis*.

From the supreme power of the prince, no appeal lay, but he might be prayed to review his sentence. Sometimes the judge below, unwilling to take upon himself the weight of a critical cause, referred it to a superior tribunal, which was called *relatio*.

*Proceedings in criminal cases.* We have hitherto said nothing of arrests, because, as we have observed above, after the cruel method of dragging the debtor *obtorto collo* was relinquished in all civil cases, there was no process but summons and distress infinite(62); but in criminal, we have in the Code, 9th book, large titles, *de exhibendis & transmittendis reis—de custodia reorum, et de privatis carceribus inhibendis*, which shew the natural and necessary difference in such proceedings.

*Public judgments* differed from *extraordinary*, as the latter were instituted for crimes not coming

(62) Here by the civil, as well as by our common law, the process ended in case of injuries without force. Blackstone's Comm. book 3. ch. 19. p. 281. Perhaps in *actions ex delicto* there might have been arrests, but I am uncertain; the following quotation bears that appearance.

The law *Patelia Papiria* decreed that no one, "*nisi qui noxam meruisset* donec pœnam lueret in compedibus aut in "*nervo teneretur*." See Heinec. 2. Antiq. p. 151.

*Noxa* is any *maleficium* or *peccatum*.

under any ordinary specific denomination, and therefore presented before the general assemblies of the people, by a mode resembling impeachments.

We have observed that criminal modes of trial were of three kinds; for *inquisition*(63) and *denunciation*, however, we must look chiefly to the canon law; the civil law, though acquainted with these modes of proceeding, saying little of them in detail; but on *accusations* it is more particular.

The right of accusing, and the form of indictments, are discussed in one title in the Code, and one in the Pandects(64). The persons forbidden to be prosecutors in their own names, were women and minors (except in treason, sacrilege, or murder of their relations) persons of infamous character, freedmen against their patrons, slaves, except for the murder of their masters; the ac-

(63) As to inquisitions, consult Dig. 1. 18. 13. Among other inquisitions, those into the conduct of viceroys, governors, and magistrates, leaving their offices, who were obliged to stay in the province fifty days after the resignation of office, are remarkable. C. 1. 49. 1. As to denunciations or official informations given in to magistrates and presidents of provinces. See C. 9. 2. 7.

(64) De accusationibus & inscriptionibus. Dig. 48. 2. Code 9. 2. Lord Kaimes saith, that the oath of calumny not being sufficient to restrain false accusers, they were obliged to indorse their names on the bill of indictment, thence called *inscriptio*, and so became liable to a *lex talionis*.

cused therefore might object to the capacity of the accuser, and if he had ground, might prefer an antecategoria or cross indictment. The inscription or indictment required a particular and accurate description of the crime, the person, the place, and the time; and it was to be subscribed by the accuser, that he might be duly punished for a false accusation.

The prosecution began by *in jus vocatione*, as did a civil suit, but here the power of actually arresting the party continued to be the law at all times(65). The next step was asking leave from the court to bring the charge *nomen deferre*. The party appearing on the appointed day, the accuser preferred his indictment subscribed with his own name.—The court then appointed a day for the trial, usually at the interval of thirty days. The accused then changed his dress and sought for patrons, and if on the day appointed he did not appear, he was exiled. The trial sometimes lasted several days, one day being often given

(65) Humanity will be pleased with the following prison regulations. Statim debet quæstio fieri, ut noxius puniatur, innocens absolvatur; reum non per ferreas manicas & hærentes ossibus mitti oportet, sed prolixiores catenas si criminis qualitas catenas postulaverit, ut cruciatio desit. Nec vero sedis intimæ tenebras pati debebit, sed usurpata luce vegetari, et ubi non geminaverit custodiam, in vestibulis carcerum & salubribus locis recipi: ac reverente iterum die, ad primum solis ortum illico ad publicum lumen educi, ne pænis carceris perimatur. 6 Code, tit. 4. *de custodia reorum*.

to the accuser to produce his proofs, another to speak to evidence, and then the accused had still an interval of several days to prepare for his defence. His defence being gone through, tables of wax were given to the judices, who wrote on them A, i. e. *absolvo*—C, i. e. *condemno*, or, N. L. i. e. *non liquet*—the majority prevailed, and then the prætor, or his substitute, pronounced sentence.

The venerability of the magistrates who thus pronounce sentence, was guarded by their character, and by their oaths, though the latter, in process of time, were sadly perverted(66).

The comparison of the prætor in the Roman tribunal to the modern chancellor, is in many respects fair, but the latter name has risen to eminence only since the extinction of the Roman empire. Chancellor at Rome was the title of a very inferior officer(67).

(66) Originally they swore that they would judge cum veritate & legum observatione, Code 3. 1. 14. but latterly se facturos, secundum id quod fuerit justius & melius, the latter word left infinite latitude, *ibid.* in auth. The law in Nov. 124. that the litigants should give nothing to the judges, means to the judices or jury, who however claimed (as our juries do) a small payment for their trouble, called *sportula*, though they do not seem to have imitated our custom of giving it in charity.

(67) *Cancellarius* was a door-keeper in the Emperor's palace. This word, so humble in its origin, has, by a singular fortune, risen into the title of the first great office of state in the monarchies of Europe, says Gibbon, vol. 1. p. 351. in a note.

I am sorry that it is impossible, from want of space, to give here a detailed account of the ranks of advocates, and regulations(68) respecting them and proctors in the Roman courts. The lawyer who would take the trouble to peruse the second book of the Code, from the sixth to the thirteenth titles inclusive, which are upon this subject, would certainly derive much amusement therefrom; his curiosity would be gratified with the various ranks and arrangements, his pride would be flattered with the honourable distinctions bestowed upon them(69), and his judgment

(68) Some of them, however, I cannot refrain from copying, which may be found in the sixth title of the fourth book of the Code. Ante omnia autem universi advocati ita præbeant patrocinia jurgantibus, ut non ultra quam litium poscit utilitas, in licentiam conviciandi, & maledicendi temeritatem prorumpant, nam si quis adeo procax fuerit, ut non *ratione* sed *probris*, putet esse certandum, opinionis suæ imminutionem patietur.

Nullum cum litigatore contractum ineat advocatus. Nemo ex industria protrahat jurgium. Quisquis vult esse causidicus, non idem in eodem negotio sit advocatus & judex. si sub specie honorarii, quod advocato usque ad certum modum deberi potuisset, si qui advocatorum existimationi suæ immensa & illicita compendia prætulisse sub nomine honorariorum poscentes fuerint inventi, ab hac professione penitus arceantur.

(69) The bar was a sure path to preferment; after a certain number of years of honourable service, the advocates rose of course to certain honours, if not profits, of no small estimation; for they were dignified with the title of

would be pleased with the order and system of the society.

It is strange that Lord Kaimes should say there was not among these barristers any *calumniator publicus*, any officer resembling that of our attorney-general, or of the king's advocate in Scotland. Of the public accuser, a term since adopted by the French, we find mention both in Cicero

courts, as appears from the following extract from the eighth title of the second book of the Code in its first order or decree, which is very remarkable, and begins thus—  
“Suggestionem viri illustris, comitis terum privatarum &  
“proconsulis Asiæ diximus admittendam: per quam nostræ  
“serenitatis auribus intimavit, fori sui advocatos petitione  
“magnopere postulasse, ut, post quam advocationis deposu-  
“erint officium, unumquemque eorum, qui in præsentia  
“sunt, vel postea matriculis eorum pro tempore fuerint in-  
“serti, clarissimi primi ordinis *comitis* perfrui dignitate;  
“quatenus et tempore quietis fructum præteritorum labo-  
“rum consequantur, proque fide, atque industria erga cli-  
“entes suos comprobata, a privatæ conditionis hominum  
“multitudine segregati, clarissimis merito connumerentur.”

Mr. Gibbon, in his seventeenth chapter, thus describes the honours and profits of the bar at Rome: “After a regular course of education which lasted five years, the students of this lucrative science dispersed themselves through the provinces in search of fortune and honours; nor could they want an inexhaustible supply of business in a great and corrupted empire. The court of the Prætorian Præfect of the East alone, could furnish employment for an hundred and fifty advocates. The first experiment was made of judicial talents, by appointing them to act

and Pliny(70), and in later times we hear of the *advocatus fisci*(71), who defended the causes of the treasury. We find also in the court of the east(72) a *primatem advocatum*, such as in Ire-

"occasionally as *assessors* to the magistrates; from thence  
 "they were often raised to preside in the tribunals before  
 "which they had pleaded. They obtained the govern-  
 "ment of a province, and by the aid of merit, reputation,  
 "and favour, ascended, by successive steps, to the *illustri-*  
 "*ous* dignities of the state. In the practice of the bar,  
 "these men had considered reason as the instrument of dis-  
 "pute\*, they interpreted the laws according to the dictates  
 "of private interest; the same pernicious habits might still  
 "adhere to their characters in the public administration  
 "of the state."—The passage is too long to allow further  
 transcribing.

(70) Cic. pro Rosc.—Plin. Epis. 3. 17. See also Hein-  
 nec. Antiq. lib. 4. 18. 17.

(71) See Code 2. 9. 4. and 10. 11. 5. There was an  
 advocate or proctor of the exchequer, saith Wood, p. 305.  
 who had a salary from the public. Their duty was to manage  
 the causes of the prince and the public, and to *prosecute crimes*.

(72) The whole empire was divided into thirty-five  
 military commanderies. All these commanders were *duces*,  
 or dukes, some only of them were *counts*, which was a  
 superior title, invented in the court of Constantine. Among

\* Mr. Gibbon here seems to think, that the technical mode of thinking  
 of the mere lawyer, is not more accommodated to the extended sphere of  
 a statesman's contemplations than his technical phrases to the language  
 of an orator. No less men than Mr. Burke and Mr. Fox, seem to have  
 adopted this idea on Mr. Hastings's trial, too much justified at the moment  
 by the part which the bar had taken on the question, whether a parlia-  
 mentary impeachment ceased by a dissolution? we must allow at least  
 many illustrious exceptions; among the foremost in England, Lord Somers;  
 in Ireland, the late Chief Baron Burgh.

land is styled prime serjeant, and in Scotland dean of the faculty. See Code 2. 8. 3.

I have been silent as to impeachments before the people, or accusations in the senate. They bear no relation to modern practice, and long before the times of Justinian they were no more. The following constitution of the emperor Leo, put an end even to any affected share of the senators in the legislature, and is a melancholy lesson to all senates. Its title is<sup>(73)</sup>, "*Ne amplius senatus consulta fiant*;" and it says, "Quemadmodum et in aliis legibus, quæ ad communem rerum usum nihil conferunt, fecimus; ut eas tanquam supervacaneas e legum corpore subduceremus; ita hic quoque facientes eam legem quæ senatoribus ferendarum legum potestatem facit, e legum quasi republica secerni sancimus, nam, ex quo senatoriam administrationem imperatoria majestas sibi vindicavit, *inutilis* illa esse judicari debeat." Heaven grant that posterity may never hear such a sentence of inutility pronounced upon our great councils of the nation!

these the Count of the East; Comes Orientis seems to have been most conspicuous; hence a count of the empire sounds so highly in Germany, which affects to represent the western empire, as Russia doth to represent the eastern.

(73) Imp. Leonis const. 78.

## CHAPTER IX.

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### ON THE PRACTICE OF THE INSTANCE COURT.

THE first process in this court is either *in rem*, or *in personam*. Clarke, in his practice, begins with the latter(1). We shall begin with the former as the most usual and frequent.

#### *Proceedings in Rem.*

These take place principally in suits for seamen's wages, when they proceed against the ship or cargo, this being their most expeditious mode, though they may also have their remedy against the master or owner(2).—In suits on hypothecation, or bottomry bonds, in which the ship and

(1) We must suppose that the validity of this proceeding in any case against the person, was once doubted in the courts of law, since in 1 Siderfin, 161, one of the judges says, the admiralty may grant process against the person *also*, as has been lately agreed.

(2) As is the constant practice, and admitted to be right in Howe and Napier, 4th Burrow's Reports.

goods are solely and specifically bound—in suits insisting on a right of possession, where there is a clear *constat* of the property, as where one part owner unjustly refuses possession of the ship to the master nominated by the majority of his partners—and in actions for collision, where there is no pretence for making the owner answerable, or demanding reparation, *as against him*(3), beyond the value of the ship.

In actions for assault and battery, commonly called actions of damage, in suits by seamen against masters and owners, in suits against persons having in their hands the proceeds of ship or cargo, in admiralty actions on ransom bills when allowed by law, and if the ship is not to be had, the process must necessarily be against the person, but these cases more rarely occur.

When the proceeding is against the ship, the action being entered, and an affidavit of the debt made by the person on whose behalf the warrant is prayed, or by his lawful attorney, process commences by a warrant directed to the marshal of the court, commissioning him to arrest the ship or goods, or both; which warrant contains also a citation to the master of the ship in particular, and all others in general, having, or pretending to have, an interest in the said ship, her tackle, apparel, and furniture, or (as

(3) For against the master, according to Bynkershoek, there is remedy in *solidum*, and beyond the value of the ship.

the case may be) in the cargo or goods, to appear personally on a day, and at a place therein named, to answer and defend, in a certain cause, civil and maritime. This warrant is executed by producing the original before the master and crew, and affixing a copy to the mast of the ship; after which an affidavit must be made of the following tenor, to wit, that the deponent did arrest the ship mentioned in the warrant thereunto annexed, her tackle, apparel, and furniture; and that he did cite all persons in general, and those requisite, in special, to appear as above; and if the arrest be made abroad, it must be certified under some authentic seal. This warrant and affidavit or certificate, are then to be returned, and if there be any apprehension of the ship's being carried to sea, the sails may be taken on shore, or a custodee put on board.

The ship being thus arrested, a proctor appears for the promovent, and makes himself party for him; and either the owner will appear to defend his interest, and by voluntarily entering into a stipulation(4), give jurisdiction to the court over him personally, or by not entering an appearance (which, perhaps, if the demand exceed the value of the ship, he may think superfluous), may oblige

(4) The nature of stipulations in the civil law, the attempts to prohibit the admiralty courts from taking them, and the difference between them and recognizances, have been stated in preceding chapters; the origin of the name is said to be stipula, the straw of old delivered as token of consent.

the court to proceed for defaults, which word here signifies non-appearance.

The proceeding for defaults is as follows: The warrant which issued against the ship having been returned with the marshal's certificate of its execution, and a proctor having appeared for the promovent, and none of the persons generally or specially cited appearing on the day, or at the place assigned, after being thrice publicly called in court, their contumacy is accused; and in pain of this contumacy, the ship, or rather they, are said to incur the first default: and then time is given to them to appear on the next court day, which is technically called continuing the certificate of the execution of the warrant to that day. This step is repeated four times, on four successive court days, as will be better understood from a view of the proceedings in such a case given in the note below(5), and then the four defaults being incurred, (for the citation

*(5) Rules of Court where no Appearance for a Ship arrested.*

*April 5.* Warrant which had issued against a ship returned with affidavit of service, and marshal's certificate of the execution. A proctor appeared for promovent, and proclamation being thrice publicly made for all persons in general having, or pretending to have, any right, title, or interest in the said ship; but no person appearing, the judge, at petition of promovent's proctor, pronounced them in contempt; and in pain of their contumacy, decreed the first default to have incurred. Certificate of the execution of the warrant continued to next court day.

called *unum pro omnibus*, is not sufficient to convict of contumacy, especially in the claim of a

*April 8.* Second default incurred. Certificate continued as before.

*April 11.* Third default incurred. Certificate continued.

*April 14.* The judge assigned to hear the cause summarily this day; on which day, the fourth default having incurred, proclamation having been thrice made for all persons, &c. and no person appearing, promovent's proctor, in pain of their contumacy, exhibited a summary petition with proper attestations to support it, which the judge admitted: after which the promovent's proctor corrected a *first decree*, and also two bills of expences, praying them to be taxed, and made oath of the necessary expenditure. The judge read signed, and promulged the said first decree, and decreed a perishable monition and commission of appraisement.

Fourth session after, the above monition and commission of appraisement was returned, and the judge assigned the cause to be heard summarily on perishable condition, which was done the next court day, and sale decreed.

*Rules in another Suit against Ship by Defaults.*

Fourth session, Easter Term, warrant which had issued against a ship returned with affidavit of service, and certificate continued to next court day.

First Session, Trinity Term; first default and certificate of execution continued.

Second Session. Second default.

Third Session. Third default.

By day. Fourth default.

Certificate continued from court day to court day, to first Session of Michaelmas Term, when promovent's proctor corrected a first decree, which judge signed and decreed

ship), the proctor of the complainant exhibits a summary petition, which Clarke calls the *articulus ex primo decreto*, reciting the cause of suit, the parties cited having been thrice called and not appearing, and his standing in contempt by having incurred four defaults, whereupon the oath required by law having been made, viz. of the debt, the proctor of the complainant prays right and justice, and to be put in possession of the ship, her tackle, apparel, and furniture, *to the extent of the debt*(6), to the intent that his property may be preserved, and for the expences in that behalf, according to the form and manner of proceeding in that court.

This article or allegation being corrected to the judge, with a schedule of expences to be taxed, and an oath of their necessity, and the parties being again thrice called and not appearing, the judge pronounces them to be contumacious; and in pain of their contumacy, admits the article above-mentioned; and the instruments on which the suit or debt is founded, e. g. a bottomry bond being exhibited to him, and attestations

a perishable monition, and commission of appraisement. Fourth Session they were returned, and attestations brought in as to perishable condition; and the judge assigned the cause to be heard summarily next court day on such perishable condition, when he decreed a commission to sell the ship.

(6) This limitation, as we have seen, was introduced by the Authentica.

made of the debt(7), a *first decree* is porrected to the court, and by it read, signed, and promulged, and the expences taxed: by this first decree (which recites the summary petition or article *ex primo decreto*,) declares its admission, and that the defaults have been incurred as alleged, the court decrees that the complainant shall be put in *possession* of the ship, her tackle, apparel, and furniture, or as the case may be, of all the goods, wares, or merchandise, now or lately on board the same, to the extent of the debt, if the things so possessed be sufficient; and if not, as far as their value; security being first given to answer for the same to any person claiming right, or intervening for their interest within a year.

The nature of a first decree(8), in the civil law has been explained in a previous chapter, and the reason given why no second decree is

(7) This is the practice according to Clarke; but can this be necessary, since the late rule of the court, 28th January, 1801, requiring an affidavit of the debt previously to issuing the warrant? Before this rule was made, warrants were sometimes obtained for oppressive purposes.

(8) The first decree seems to have been erroneously omitted in practice in Ireland, and the court to have usually proceeded at once to appraisement and sale. I have spoken to practitioners there who never heard of the name.

Even in England, the notions concerning it seem to have been somewhat vague; see the case of the *Exeter*, 1 Robinson, p. 173. where, under a *primum decretum*, there was not merely a delivery of possession, but the ship was erroneously sold without further application to the court.

necessary in the court of admiralty, where the proceeding is *in rem*, the first decree by the civil law giving nude possession, and the lapse of a year producing a possessory right and enjoyment of the fruits.

The effect of this first decree, is only in the first instance to put the party in *possession* of the thing, and gives no power over the proceeds. All further proceedings of sale, and power over the proceeds, must be by subsequent application to the court(9), although upon such application, a decree of sale and possession of the proceeds are almost matters of form, and usually obtained as ordinary process of course. An allegation is commonly made of the perishable condition of the ship, and of its actual or probable deterioration by time, concluding with a prayer that the ship may be appraised and valued, and decreed to be sold; and that the monies arising therefrom be brought into the registry. Or sometimes there are two petitions or allegations, the first stating that the ship lies in the river, and praying a commission of appraisement to the marshal, and then a further petition, alleging perishable condition, and praying a sale. Upon this the court decrees what is called a perishable monition, i. e. it decrees all persons to be monished (by affixing

(9) See 1 Robinson, p. 174 and 175. Groenwegen *de legibus abrogatis*, says the *Primum Decretum*, is totally out of use in modern days; surely not in England. I believe not on the continent.

an original monition on the Royal Exchange, and by leaving there affixed a true copy thereof) to appear in court on a certain day, and hear an allegation as to perishable condition, and witnesses being there sworn, or a commission issued to take their depositions, and such their depositions published, to shew cause why the ship should not be exposed to public sale, and the money proceeding from the sale be brought into the registry for the use of all persons interested, with the usual intimation.

The cause is then assigned to be heard summarily on perishable condition, which appearing by the attestations, the judge decrees a commission to sell the ship and cargo, or both, as the case may be, the proceeds to be brought into the registry for the use of all persons interested.

This appears to be the regular course, but sometimes a commission of appraisement and sale directly follows the first decree, and in Ireland has usually, though irregularly, followed the defaults, and been granted on the summary petition without any first decree; and in England we find from late reports, that instances have happened where ships have been sold under the first decree, without any application to the court; but this was justly reprobated as a step totally irregular and unauthorized by that decree(10).

The proceeds of the sale being brought into the

(10) Case of the Exeter, 1 Robinson's Reports, 174.

registry, the court exercises its discretion over them, giving priority where there are various suitors, according to precedence in commencing the suit, or perhaps according to other circumstances, and decreeing the produce over and above the principal demand of the promovent's, to be paid over to the true owner, saving the demands of any persons legally intervening in the cause *pro interesse suo*.

It is very usual for the impugnant, or some other person interested, to come in while the defaults are running, or after they are all incurred, or even within a year after the first decree obtained; and on giving security and paying all costs, to be admitted to defend.

If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of the suit, or sometimes after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the registrar of the court, *in usum jus habentis*.

We have hitherto considered suits against the ship for some debt, or those founded in its hypothecation: a possessory suit to recover a possession which has been by some means illegally ousted, detained, or taken away, is of a different nature in its origin and object, but the process is the same as above described. If no person appears to defend after a citation has issued to the detainers of the ship in particular, and all others

in general, the defaults go on in the same course, and the ship is condemned in pain of the contumacy of the persons cited to the promovent, not in satisfaction of a debt, but as his possessory right(11).

Let us now suppose that some person cited or interested, as the master or owner, or occupier, claiming right of possession therein, appears and defends the ship, he will either appear under a *protest*, or absolutely.

In the former mode, the party appears protesting that he doth so only to save his contumacy; and that, for reasons set forth in the protest, he is not bound to answer; as for instance, that he is sued as owner, although he never was owner, but only a broker;—or that he is sued for wages by a mariner who never was on board his ship,—or that he is sued for ransom money exceeding the value of a ship and cargo, which he has offered

(11) Clarke extends this practice also to petitory causes, or those in which a right of property is discussed, but such are not now by this court entertained.

Of possessory causes, instances have been given in a preceding chapter, as where a former proprietor claims possession of a ship captured by the enemy, and purchased by a neutral, without a legal sentence of condemnation; but as this case appears to me to belong to the prize court, I rather prefer the instance of part owners praying possession to be decreed from the others to a ship's husband, by them appointed for their use, when their partners have wanted to carry the ship to sea against their will.

to abandon(12), which assertions he supports by affidavits and exhibits, and desires to be dismissed. To this the promovent replies by allegations, contradicting those of the protester, and further alleging that his appearance under protest, is in no respect agreeable to law and the known practice of the court, the matter by him set forth being to be introduced in no other way than by plea and proof, wherefore he prays the judge to reject his petition, to be dismissed, and to assign him to appear absolutely.

If the protest be over-ruled, he then appears absolutely by himself, or his proctor lawfully constituted. Whenever a person thus appears absolutely(13), a fidejussory caution or security is en-

(12) This was the subject of the protest in Yates and Hall, a remarkable case, as to which, see 1 Term Reports, p. 79.

(13) The following rules of court, in two several causes, where there had been an appearance for the ship, will best illustrate the text, as to the practice in such cases :

*A. against the Ship B. whereof F. G. is Master.*

The master intervened for his interest.

Bail given to answer the arrest.

Promovent assigned to libel with sureties on the next court day. Impugnant assigned to bring in mariners' contract, and ship's books at same time.

Promovent assigned that he had given bail to prosecute, and then gave in summary petition.

Mariners' contract and ship's books brought in. Promovent assigned to prove by first session of next term.

tered into by *fidejussors*, or sureties, to the three effects already mentioned when treating of the

Assignment to prove continued.

Promovent prayed publication, and cause to be heard summarily.

*Another Cause against the Ship D.*

*September 3d.* Warrant returned. Proctor appeared<sup>7</sup> for impugnant. Prayed that promovent should libel with sureties; and so decreed. Impugnant to bring in mariners' contract and ship's papers.

*September 18th.* Sureties given by promovent. Ship's papers brought in. Promovent filed a libel. Witnesses produced.

*October 23d.* Witnesses produced. A commission of valuation which had issued, returned and confirmed. Publication decreed, unless cause.

*November 2d.* Promovent stayed publication, by praying to be restored to a term probatory upon an affidavit, for liberty to produce more witnesses: granted. And an attachment, unless cause, granted against a witness who disobeyed a citation to appear served on him by the marshal.

*November 6th.* The refractory witness appeared. The impugnant exhibited a matter peremptory and defensive. Promovent to answer next court day.

*November 10th.* Promovent admitted the said matter peremptory as far as, &c. &c. and contested the rest negatively. Promovent's personal answer to said matter peremptory, prayed and decreed.

*September 21st.* The court admitted Promovent's libel as far as by law admissible, and assigned the same to be proved. The personal answer of impugnant was prayed and decreed.

*September 25th.* Impugnant sworn to give in his personal answer.

practice of the civil law :—*Judicatum solvi*, to pay the condemnation or sum decreed, as also the costs which shall be adjudged. *De judicio sisti*, to appear from time to time, and at the hearing, and abide the sentence. *De rato*, to ratify the acts of his proctor. In this stipulation the sureties, and the party by his sureties, expressly submit to the jurisdiction of the court, and consent, in case of default in the performance of the conditions, that the admiralty process shall issue against them. This stipulation, though in the nature of a recognizance, differs from the security usually so

*October 5th.* Rule, that impugnant should be attached for his contempt in not having given in his personal answer, unless cause, next court day.

*October 9th.* Personal answer given in; then impugnant offered to bail the ship, and prayed a commission of valuation, that he might bail her pursuant to this valuation. Decreed, and commissioners named, two by each party.

Two witnesses produced same day to promovent's allegation, and also sworn to interrogatories.

*November 20th.* Promovent prayed that impugnant should be restrained to a time of proving his matter peremptory. Court limited him to a fortnight. Promovent's personal answer given in.

*December 12th.* Publication, unless cause, next court day.

*December 17th.* Publication passed.

*January 24th.* Being the first day of the next term, the judge assigned to proceed summarily, and to inform next court day.

*January 28th.* Information and sentence.

termed ; it subjects the persons and goods of the stipulators, but it doth not enable the admiralty to issue process against their lands. It must also be observed, that the bail are not liable beyond the extent of this fidejussory caution, and that the security doth not affect them in a court of appeal, where the impugnant must get fresh fidejussors, (14).

Where the ship is seized, it seems reasonable that if the demand doth not exceed the value of the ship, the impugnant appearing for his interest should not be obliged to give security for more than the costs that may be incurred ; and in all cases the impugnant is at liberty to object, that the promovent has maliciously laid his action at a sum greater than can possibly be due, in order to prevent his procuring bail, in which case the judge may insist on the promovent's oath, as to the sum which he really believes to be due(15).

The impugnant having appeared specially, or intervened for his general interest, and given bail to answer the arrest, then by his proctor calls upon the promovent to libel with sureties by the next court day, otherwise to be dismissed with costs. This the promovent accordingly must do, after

(14) Clarke's Praxis. Note to title 59. Fifth edition amended.

(15) Clarke's Praxis, tit. 12. This seems now to be made unnecessary, by the late rule requiring an affidavit of debt before the warrant issues.

the impugnant has given bail, his sureties being bound to the prosecution of the suit, to pay costs if the party be defeated in the cause, and to produce the promovent in judgment whenever required(16).

At the same time that the securities above-mentioned are entered into on each side, the principal parties respectively are to enter into cautions in double the sum in which their sureties are bound (or at least in a larger sum, according to the discretion of the judge), these cautions being to the same effect with the stipulations entered into by the sureties, except as to an additional clause indemnifying those sureties(17).

If either of the parties makes it appear upon oath that he is unable to find sureties, he may, at the discretion of the court, be admitted to the juratory caution(18).

Stipulations, as we have seen, were in the civil law prætorian and judicial, or conventional, made to the court or to the party(19). This distinction is material, on account of the different effects which they produce. When the stipulation is prætorian, if one of the sureties die, new security must be given : otherwise, when conventional. Over

(16) Clarke's Praxis, tit. 14.

(17) Ibid. tit. 18.

(18) See ante the practice of the civil law.

(19) See the chapter on Title by Contract in the first volume.

the caution given to the court it has power, and may remit part, or adjudge a reasonable part to the promovent, and dispose of the rest at his discretion; but it has no such power over the conventional. The stipulations of which we have now been speaking are *conventional*. In proceedings against the person, the caution for his appearance is *prætorian*. In these conventional stipulations, the sureties may be proceeded against, though the principal be dead, for they are sued as principals, (20).

These stipulations in England are not under seal, from fear of prohibition. In Ireland, they usually have been sealed. They affect body and goods, but not the lands.

If either party be dissatisfied with the bail or security offered by the other, or finds in any stage of the cause that the bail(21), though at first sufficient, are *lapsi facultatibus*, he is to make his objections to the court, which will examine into them, by looking for the plainest, simplest, and most summary proof, and if it thinks necessary order fresh security to be given. If the bail are sufficient, the ship is usually released, and suffered to proceed to sea.

(20) See 1 Salkeed, p. 34.

(21) These stipulations are not discharged by surrendering the principal, as bail are by our common law; for the *fidejussors* are absolutely bound, and were so by the civil law, *judicatum solvere*, to pay the costs and condemnation at all events.

The promovent having libelled with sureties, the cause proceeds exactly like a *summary* cause in the ecclesiastical court. All causes in the admiralty court are *summary*(22). *Clarke*, therefore, in his practice, refers entirely to the proceedings in the ecclesiastical courts, as to these subsequent stages of the cause, a liberty for which I might plead some excuse also(23); but it seemeth more advisable to give here a brief delineation of the principal steps to be pursued, *taking our direction, where Clarke is silent in his admiralty practice, as he has directed us, from the proceedings of the ecclesiastical courts.*

(22) The distinctions between plenary and summary causes are well known. It is familiar also to the common or at least to the statute law. *Plenary* are those causes in which the order and solemnity of the law are exactly observed. There is a formal *contestation of suit*, a regular *term to propound*, and solemn *conclusion* of the acts; and if there is the least omission or infringement of the regular order, the whole proceedings are annulled. *Summary* are those in which this order and solemnity are dispensed with; the suit is, *as it were*, contested, by the next contradictory act after the libel put in that concerns the merits of the cause. Such as the dissent of the proctor—the *second assignation* to hear sentence supplies the place of *conclusion*—there is no assignation to propound, nor express conclusion—in short, *omnia substantia judicii sunt sublata*. Sometimes even the libel and all the proceedings may be *viva voce*.

(23) As having given a clear sketch of the practice of the ecclesiastical courts in the first volume.

The libel being filed with all due circumstances, the next step is the giving in of impugnant's answer. This may be a general confession, in which case he is said to contest the libel affirmatively; or a general denial, in the nature of a plea of the general issue, which contests it negatively: or the libel may be opposed by exceptions, or matters defensive, and after being answered in some of these ways (any of which modes of answering in a summary proceeding amount to or are taken for contestation of suit, or in lieu of it issue is joined)(24).

If the impugnant neither confesses the promonent's libel, nor contests it negatively, i. e. doth not plead the general issue, he probably then puts in an exception, which may be either *peremptory* or not: if it perempts the suit, it must do so either for cause apparent on the face of the libel, or for cause first appearing in the exception itself. In the former case it answers to a general demurrer—in the latter, to a special plea in bar.

If it doth not preempt the suit, but excepts for the defect of form in the promonent's pleading, or from matter set forth in itself, but not amounting to a bar, it answers in the first place to a demurrer for want of form; in the latter, to a plea in abatement. But still to all these various pleadings the civil law has assigned only the general name of exception, with a distinction into those dilatory and those peremptory.

(24) See the strict meaning of contestation of suit, in the chapter on the Practice of the Civil Law.

If the impugnant's plea doth not merely exclude the promovent's action by a legal objection, such as that of a former decision on the same point between the same parties, but sets up a defence on the merits, shewing that he has no cause of suit, this is by the civil law, as we have seen, termed *defensio*, a defensive matter.

To the plea of the defendant, defensive or exceptive, the promovent may reply in various ways, as the case may require, e. g. by contesting the admissibility of his adversary's exceptions, which may be compared to joining in demurrer; by contesting it negatively, if it was in the nature of a plea in bar; or by putting in to it a peremptory exception, which is as a demurrer; or perhaps by specially replying, though such special replications are not frequent. The promovent possibly may rejoin by a pleading called a duplication; and in the old Roman law we find mention also of triplications and quadruplications, names formerly used in the English law(25), instead of rebutters and surrebutters.

We have hitherto considered the promovent as filing but one libel, and the defendant but one plea, and in fact they can file no more; nor do the books of practice take notice of any others.

(25) To go beyond a duplication was reckoned bad pleading; and it is said in a note on title 19 of Clarke's Practice, that in the admiralty of Holland a duplication is not allowed.

but additional allegations(26) may be put in, not charging new or distinct causes of suit or grounds of defence, but only new circumstances or additional facts in support and confirmation of the original pleadings. These must be restrained from running to excess(27) by the discretion of the court.

Each party is entitled at any time, even down to the hearing of the cause, to demand the answer of his adversary upon oath to every one of his pleadings: a manifest advantage in the practice of this court over that of courts of equity, where

(21) *Allegation en termés de Palais* est la citation d'une autorité d'appuyer une proposition.—Encyclopedie of Diderot & D'Alembert, Paris, 1751.

*Allegationes partium*—rationes quas reus & actor producant; hinc nata nostris vox familiaris *alleguer* de eo qui instrumenta vel testes vel rationes pro suo jure tuendo profert.—Du Fresnes' Glossary.

The word comes not from *allegare*, which is *ad alium mittere*, but from *alligare*, i. e. *ad ligare*, to tie or annex to.

(27) *Est et alius modus refrænandi has secundas & aliquando etiam tertias & quartas propositiones materialium sive allegationum*, says Oughton, note on title 112. The two methods appear by that and the following section: 1st. *Petendo expensas retardati processus*. 2d. *Assignando terminum infra quem ad amputandas dilationes, si multiplacentur allegationes*. He here speaks of the number as only limited by the discretion of the court, or in consequence of some rule served upon the opposite party. In the ecclesiastical courts it is usually confined to three.

this benefit is confined to the plaintiff, unless the defendant has ground for filing a cross bill.

If the party decreed and cited to give in a personal answer doth not obey that citation or order, a citation *viis & modis* issues; and if he still continues contumacious, a citation goes against the bail or sureties to produce him, which if they do not do, nor appear to make excuse, proclamation being thrice made for them, they are to be declared contumacious, and a decree made to apprehend them personally.

If the party appear, he is sworn to give in his personal answer before a day assigned, which if he omits to do, he will be attached(28), and Clarke says may be liable to fine and pecuniary penalties. But this is not a court of record. Exceptions may be put in to these personal answers, as to an answer in chancery.

(28) The text will be illustrated by the following extract from rules in a cause :

2d Session, Easter term. Decree for answers and compulsory.

3d Session. Decree for answers returned, and certificate continued to next court day.

1st Session, Trin. term. He appeared to decree for answers.

31st July. Impugnant decreed to be attached for not answering.

2d Session, Michaelmas term. Impugnant produced for his answers. His proctor undertakes to pay the contumacy fees. He is sworn and admitted to give in his answer.

The parties who are not sufficiently relieved by the personal answers of their adversaries, must proceed to proof by witnesses and instruments. And here, as Clarke refers us entirely to the practice of the ecclesiastical courts, with some small variation by him pointed out, it is my business to point out what that practice is as to proofs and depositions.

The pleading being filed, a term probatory is granted, within which witnesses are to be produced, which by the course of the court lapses, or is terminated on the next court day. This is thrice repeated, so that the three probatory terms would by the style of the court lapse on three successive court days, if they were not continued, which they almost always are, on the proctor's prayer, for such a reasonable space of time as is necessary for the examination of the witnesses, until the opposite party or the judge object to any unreasonable delay. These continuances are absolutely necessary, since in scarce any instance would it be possible for the party to bring up witnesses perhaps living at a great distance, nor for the examiner to examine them within the ordinary curial terms.

The term probatory is common to both parties, i. e. each may examine during the time granted to the other, and as long as it continues; and there are three terms probatory granted on each of the allegations or pleadings, which either party is at liberty to file; during which terms probatory each

party is at liberty to produce witnesses, not only to the matters contained in the last allegation filed, but also to those in all the preceding allegations; so that until publication, and as long as any term probatory is in existence, the whole cause and all the contents of all the allegations are open to proof.

If the party who prayed the term probatory is delayed by want of the personal answer of his adversary, the term probatory runs only from the time of that answer coming in; and though it may have lapsed, yet for special cause the party will be restored to a term probatory by the court: on the other hand, if the party obtaining it should afterwards change his mind, and think it unnecessary to examine further witnesses, he may renounce it, except it has been granted in pain of the opponent's contumacy who absents himself, or except the other party has accepted it, and protested of using it as common to both, unless he so accepts it merely for delay, and afterwards doth not examine witnesses, in which case he must pay costs of process retarded.

If the witnesses appear, they are sworn (under a penalty, as Clarke says) to undergo their examination: if they do not appear, a compulsory process issues to make them appear; or if they cannot be served personally, a decree or citation *viis & modis*, and if that be not obeyed, a warrant for their personal apprehension.

●

The probatory term is naturally continued by the contumacy of the witnesses to give time to subdue it; but if the judge has reason to think that their absence is the effect of any collusion or trick to delay the cause, he may proceed to the assignation for sentence; but yet if they afterwards appear before sentence, and purge their contempts, they may be examined by leave of the court.

The witnesses not contumacious are produced in court within the probatory term, and sworn; or if at a distance, a commission issues to examine them(29). On their production, Oughton gives particular directions about the adversaries dissenting to their production, and protesting of its nullity, which in practice is not now done, the adversary merely swearing them to give true answers to his queries, in case he means to cross-examine them. Oughton says, that the judge admonishes them to appear to be examined before the next court day, or within some competent time, but neither is that the modern custom(30). The party producing them gives notice to the opponent of the articles of his libel, to which he intends to examine them.

(29) Oughton says in a note, title 80, though the witnesses must be *produced* within the probatory term, they may be *examined* after it has lapsed, and so is the practice. All that is necessary is to produce them within the time.

(30) The court usually admonishes them, that they must attend the examiner of the court to be examined, and that the examiner will give them due notice of the time.

The witnesses produced becoming thereby common to both parties, the adversary may administer to them interrogatories, which he must do within twenty-four hours, unless further time be granted(31). A copy of the interrogatories, according to Oughton, is not to be given to the opponent, and this cross-examination doth not preclude objections to the witnesses(32). The party producing them cannot impeach his own witnesses, insomuch that though he may afterwards chuse to wave their examination, yet he cannot prevent the opposite party from cross-examining them.

The witnesses are to be secretly and separately examined, not in the presence of the parties or other witnesses. Their depositions, after being read over to them article by article, and they asked whether there be any thing which they wish to alter or amend(33), are then to be signed by the witness, and he afterwards *repeated* before the judge, i. e. asked again in the open court by the

(31) Each party of course may read the evidence given by his witnesses, as well as those of his adversaries, on their cross-examination.

(32) i. e. As I conceive to their sayings, for I apprehend he cannot afterwards object to their persons. Oughton thinks that interrogatories more frequently prejudice than assist the party offering them.

(33) How much is this preferable in some respects to an examination at nisi prius, where every incautious or hasty impression is instantly bellowed to the jury, and insisted upon; without giving time to the witness to correct a particle, or if he attempts to do it, perjury or prevarication is immediately charged on him.

judge, whether there be any thing which he wishes to correct or alter. This is indispensably necessary, because though the examination is before the examiner, it is always presumed, says Oughton, to be in the presence of the judge.

If the witnesses, through illness, imprisonment, age, or infirmity, are incapable of attending, although resident, the judge, or his surrogate, or I suppose the usual examiner, may attend and examine them at their own houses; and if they live at a distance, they must be examined by commission proceeding from the judge, if they are within his jurisdiction; otherwise letters requisitory must go the judge within whose jurisdiction they reside, requesting him to examine, or have them examined, as it is called *sub mutuæ vicissitudinis obtentu*, from the mutual aid thus granted by these several jurisdictions; or commissions be granted to foreign parts for the examination of witnesses.

I shall first consider commissions issuing within the jurisdiction where the cause arises. These commissions issue to such persons as the judge may please, usually the examiner's deputy examines, or other officers or appointees of the court, empowering them jointly and severally to sit and examine, at an appointed time and place, assuming to themselves an actuary, i. e. a register, properly among the notary publics, with a term assigned for transmitting or returning the commission, and the term probatory is to be continued

until the day of the return, and proper notice(34) given to the opposite party of the time of opening and proceeding on the commission.

Examiners are sometimes nominated by the parties, a practice which Oughton himself observes, is fraught with many mischiefs, inasmuch as the commissioners so nominated will naturally make themselves parties, and be in danger of not examining indifferently, and deviating into perpetual contests(35). The wisdom therefore of ecclesiastical judges has taken a hint from the suggestions of Oughton, and commissions are now usually in those courts directed but to an officer of the court; and the proctor of either party, if he chuses to have the commission attended, must do so either in person, or by a substitute, who must be a proctor(36).

Now that an officer of the court examines, who is probably a notary public himself, it is often thought unnecessary to assume an actuary.

The opposite party may join in the commission

(34) Which is three days, according to Oughton.

(35) *Partes solent nominare commissarios sibi amicissimos, & ita communiter non dicuntur commissarii judicis sed partium; & gerunt se ut partes*, tit. 86. sec. 8. and read his note to the same section.

(36) A proctor can here appoint a substitute. Strictly speaking, a proctor cannot appoint a substitute till after contestation of suit, when contestation of suit is necessary. This means, however, where he has no special authority for so doing; but usually in their original ge-

to save expence, and examine his own witnesses under the same. When the commission goes down he may administer interrogatories, or if he does not chuse by his proctor to be present, he may, at the time of speeding the commission, deliver in his interrogatories to the register, not to be shewn to any person until the commission be opened; but if afterwards he chuses to be present by his proctor, these interrogatories may be substracted, and new ones administered: If no interrogatories be previously prepared, he usually gets a reasonable time from the commissioners below to prepare and bring in interrogatories, having only twenty-four hours in strictness.

If the adverse party doth not appear at the time of speeding the commission, he is to be thrice publicly called, and every thing is to be done in *pænam contumaciæ*, *in pain* of his contumacy; and Oughton thinks, that if he doth not chuse to be present, he ought to take care at the time of granting the commission, to protest of nullities, for that otherwise he cannot afterwards, except against the witnesses. Tit. 86. sec. 11.

The certificate of the execution of the commission is to be directed to the judge, subscribed

neral proxy, they have such a special clause empowering substitution *ab initio*.

If the proctor disobeys such an order of the court as above, he may be suspended; and it is to be noted, that a proctor of doctors commons suspended, cannot have a mandamus to restore him. See 3 Bacon's Ab. 531. and Burn, title Proctor.

and signed by the persons appointed to expedite the commission, and containing all the acts done by virtue thereof. Every leaf of the depositions should be subscribed not only by the witnesses, but also by the commissioners, and the whole carefully sealed up with an authentic seal, until produced in the court from whence it issued, and aperture the prayed.

If the commission is to be executed in foreign parts, it may perhaps be directed to the principal magistrate of the place, or his deputy; and in such case, as it is difficult to ascertain the exact time, the commission may be more indefinitely directed to be executed between such a day and such a day, giving due notice a certain number of days before to the opposite party.

### PUBLICATION.

Whenever the proctor of either party doth not intend to produce or examine any more witnesses, he may pray publication, which sometimes on special circumstances is prayed, saving the examination or repetition of some particular witness. Publication may be stayed on sufficient cause at the prayer of the opposite party, and putting in a new pleading upon his part (if the whole number allowed him be not out) is always sufficient cause, and stays it of course; so that where each party chuses to put in their three pleadings, and are ready with them, publication cannot pass till they are all exhausted, and the witnesses to them

examined; but the party which prays to stay publication, must be ready with his pleading at the time it is prayed; it is for the court to determine whether publication be unreasonably or designedly delayed, or commissions tediously or improperly executed, and to act accordingly.

Publication having passed, and copies of the depositions being given out, if the witnesses have not fully answered to interrogatories, the court will oblige them to answer more fully; if other exceptions appear to the testimony, the parties will offer them. These *exceptions to witnesses* are either general or special; the former offering general objections, the latter specifying particular facts, causes, and reasons of exception; and each of them may be to the *persons*, as that they are of infamous character, or to the *sayings*, that they are contradictory, repugnant, or *extra-articulate*; and the party may, saith Oughton, demand the oath of calumny or malice from him who excepts generally, to oblige him to shew that he doth not except for the sake of delay.

Probatory terms are granted on these exceptions, and commissions to examine as in the principal cause.

The party to whose witnesses exceptions are made, may bring others to *corroborate* them, and may also impeach the witnesses produced to support the exception, who are called *reprobatory* of the original ones, by others *reprobatory* of them, but the contest can go no further, according to

the adage—*In testem testes, & in hos sed non datur ultra.*

The party excipient may corroborate his witnesses also, but corroboration cannot aid those to whom specific objections have been put in(37).

Exceptions to witnesses, if any, being discussed, the cause is now ready for hearing; but even at, or after this stage, one species of evidence is still admissible, that of such solemn instruments and written documents in which there is no danger of perjury, and which, though if alleged in the libel, they ought to be produced before contestation of suit (or the act, whatsoever it be, which in summary causes is substituted for it); at all events before the second assignation; yet are sometimes permitted to be produced and proved as exhibits even at the hearing.

If these instruments are in foreign languages, persons skilled in those languages are to be sworn as interpreters, and a copy of their translation, oath being made of its fidelity, lodged with the register(38), as proof.

Publication having passed, the judge assigns to hear sentence, and to inform; and of these assignations, to hear sentence in summary causes,

(37) Oughton, note to title, 102.

(38) Clarke seems here a little inconsistent. He makes the proctor then pray that the original may be re-delivered; and yet he says, it ought to remain in the power of the register.

there are properly and strictly two; the second corresponding to conclusion in plenary causes, and precluding the admission of all further evidence, without special licence obtained from the judge. Indeed, in causes heard summarissime, as are sometimes suits for seamen's wages, they are, sometimes after publication, ordered at once to be heard summarily next court day. And indeed in some of their suits, when trifling, there is no publication, witnesses being only examined *viva voce* at the hearing; and it is said in a note on title 19 of Clarke's Practice, even that their petition need not be in writing, though it uniformly is so.

After the second assignation is passed, the judge receives information by hearing the evidence read, and the arguments delivered by the advocates, and then proceeds to pronounce definitive sentence.

We have thus far considered the suit carried on directly between two parties, but it may become also incumbent on a third to intervene for his interest during their controversy. This he may do either as a creditor having some superior claim, or as the real proprietor, or legal possessor of the thing in question, alleged by promovent to belong to, or to be unjustly detained by the impugnans. The intervenient must give security by fidejussors, to ratify the acts of his proctor, to appear in judgment<sup>(39)</sup>, and for costs, if decreed against him. If he intervenes after the first decree ob-

(39) *Not de judicato solvendo*, as is evident.

tained, he must pay the costs of that decree; and the proctor of promovent being then *functus officio*, he must cite the promovent himself, if he be alive, otherwise his sureties, to shew cause, if they can, why intervenient should not be allowed to propound his interest. If promovent doth not appear, a warrant is obtained to attach and arrest him.—If he doth appear, the intervenient propounds his interest, and proceeds as parties proceed in ordinary causes.

If the intervention be before the first decree obtained, the promovent may, notwithstanding, proceed against impugnant, and if he doth not appear, go on with the process for defaults, and obtain the first decree, but possession of the goods is not to be delivered to him, pending the suit between him and the intervenient.

*Sentence and Execution.* When the cause has been heard, and the judge is ready to pronounce sentence, a citation issues to the party to shew cause, if he can, within a limited time, why the sentence should not be passed, and execution of it commanded, and to hear the sentence. At the time appointed, sentence is given, a schedule of the costs is then porrected, which the judge taxes, appointing a certain time within which they are to be paid. If after a public edict issued, the defeated party will not appear, the bail or fidejussors are monished, and obliged to perform the decree, to pay the costs, and sometimes, if the party live out of the kingdom, or has no fixed

domicile, the fidejussors are monished in the first instance.

We have hitherto considered the practice in suits against ships and goods, by creditors claiming a lien thereon, or insisting upon hypothecations thereof made to them, setting up a possessory right to the same, or proceeding against the same for collision and damage. We proceed now to mention causes depending on claims or questions of property.

*Petitory Suits, or Causes of Property.* It has been repeatedly observed in the course of this work, that the court of admiralty doth not at present pronounce directly on questions of ownership, and that where a question of property is concerned, it has long ceded its jurisdiction to other courts, and will not entertain a question of property, unless incidentally arising<sup>(40)</sup>, and in such a manner as is not disputed between the

(40) See the cause of the *Aurora*, 3 Robinson's Reports, p. 133. where the court refused to try the case, there not being a *constat* of property sufficient to induce the court to proceed upon it, as in a case of possession; and in that case Sir W. Scott says, it was held down to no very distant period, to be within the jurisdiction of this court, to examine and pronounce for the title of ships, or questions of ownership. The court now is very cautious not to interfere in questions of this nature, being some time after the restoration informed by other courts that it belonged exclusively to them. It appears from 1 Shower, 179, that pleas of property were then admitted in the instance court, as they still may.

parties, and then it can hardly be said to judge on the matter of property as a question. However, as the court did entertain such questions until after the restoration, and in not doing so may be supposed to submit rather to authority than reason, I might be accused of executing my duty imperfectly, did I omit to mention some rules regarding practice in petitory causes, laid down by Clarke and others.

When petitory causes were admitted, if the party in a possessory cause perceived from the inspection of the proofs therein, that he had no prospect of success in the question of property, he might decline the contest, but his adversary, for the better confirmation of his title, might proceed in the petitory, and obtain final sentence therein. But if he did, he must libel anew, and produce fresh proof, unless the evidence of the witnesses produced in the possessory had extended to a proof of property. On the other hand, the party defeated in the possessory cause might proceed possibly with success in the *petitory*, in which the proceedings were similar to those in other maritime causes. And sureties were to be given by the successful party in the possessory, for restoring the goods, if there should be a decree against him in the petitory, at least if the defeated entered a protest that he intended so to proceed(41).

(41) The security also went to stand the sentence, pay costs if decreed, and ratify his proxy; and the promovent

*Collision Cases.* The practice in suits against the ship itself, in cases of tort or damage, arising from the collision of ships, doth not, in any observable respect, differ from the practice in any other suit against the ship, either where the proceeding is by default, or where some person appears for the ship, and his interest.

*Proceedings in Personam.*

A warrant goes in the name of the king(42), directed to the marshal and his deputy, empowering and charging him to arrest, or cause to be arrested, *the person*, and him so arrested to keep under safe and secure custody, so that he be forthcoming before the court to answer in a maritime cause.

If the warrant is to be executed within twenty miles of the capital, the marshal himself is to execute it; if further, the party acting as his deputy. The warrant is to be shewn, and the cause of arrest told to the impugnant, who will be then detained in custody, till he gives a sufficient fidejussory caution, which, according to

in the petitory cause gave fidejussory caution to the same effects, and also to prosecute his suit, I conceive in the prize court. See *Brown's case*, 1 Salk. 32.

(42) Clarke says it should be in the name of the lord high admiral, directed to all justices, &c. &c. and especially to the marshal, and that the register issues it of course, without the judge's order.

the course of the court should be five hundred pounds. The warrant is then to be returned, with a proper certificate of its execution.

If the impugnant doth not appear, he is pronounced contumacious, and a fresh warrant issues to take him, and the judge may allot some part of the security to the promovent to compensate his costs, and if he sees meet may remit the rent(43); but if it appear that the impugnant has fled the kingdom, and cannot be the whole sum in the security or stipulation is to be adjudged to the promovent(44).

If the impugnant appears, and the promovent absents himself, the latter is to be publicly thrice called(45); and then if he doth not appear, the judge may at his discretion give sentence on the same day, or expect him to another court-day, or which is most usual, appoint a day at a competent distance, on which if he do not appear, the impugnant shall be dismissed with his costs; and if the impugnant thinks it probable that the promovent will appear that day, it is advisable for him previously to introduce his own sureties.

(33) This extraordinary doctrine I never heard of in practice. The reason given in the notes on Clarke is, that the stipulation is *prætorion*, i. e. the caution or *security* is given to the admiral, not to the party, and if forfeited, is forfeited to the former.

(44) Clarke, tit. 9.

(45) Clarke says oddly, by the *marshal*.

When the party appears he is to give new sureties (for the first were only bound for his *appearance*) unless on account of poverty he be admitted at the judge's discretion to the *juratory* caution(46), otherwise to remain in prison(47).

She subsequent stages in the proceedings in suits against the person *merely and directly*, do not appear to me to differ from those against the person where he comes in *collaterally* (i. e. not to defend himself, but his ship, the original and direct action having been *in rem*), and therefore I think it unnecessary here to repeat them.

Let us lastly suppose that the person against whom a warrant has issued cannot be found, or that he lives in a foreign country: here the ancient proceedings of the admiralty court provided an easy and salutary remedy, though, according to Huberus(48), not authorized by the example of the civil law; they were analogous to the proceedings by *foreign attachment* under the charters of the cities of London and Dublin. The goods of the party were attached to compel his appearance. By this means, if a foreigner owed money in England, and any ship of his came into a British har-

(46) This, observes the note on Clarke, is contrary to Farinacius, who says the *fidejussor judicio sisti* is bound for the parties' appearance at all times down to sentence.

(47) The prison may be where the admiralty chuses—is usually the Marshalsea.

(48) See Heberus *De in Jus Vocando*.

bour, or any goods of his were found in these realms, they were seizable by his creditors; and by this means the English creditor had an easy remedy for his debt, and the foreign merchant acquired more credit in England, when it was so easy to find remedy against him; for this process of attachment of goods went not only against those in the actual possession of himself, his factors, or agents, but also against those in the hands of his debtors, since the maxim taken from Justinian's Code was, *debitor creditoris, est debitor creditori creditoris*. This salutary proceeding has in latter times gone into disuse in England, and great is the mischief accruing to commerce from the want of it. It still prevails in many parts of Europe, and gives to foreigners an evident advantage.

### *Appeals.*

We come ultimately to consider appeals. The mode and process of appeal from this court is similar to that from the ecclesiastical courts, to which therefore we must generally refer. It lies from a vice-admiralty court to the high court of admiralty, or from the latter to a court of delegates. Herein, however, they differ, that no appeal lies from the court of admiralty for a grievance, except it be a gravamen irreparabile, or an interlocutory having the force of a definitive sen-

tence, which is agreeable to the rule of the civil law, though not of the canon(49).

The appeal must be interposed within *ten* days, the time allotted by the civil law; whereas in the ecclesiastical courts fifteen are given by statute 21 Hen. VIII. ch. 12; and if from a grievance, should be in writing, and specifically contain the circumstances of the grievance; whereas appeals from definitive sentence may be either *viva voce* in the presence of the judge, *apud acta* at the time of the sentence, or reduced to writing within ten days after, before a notary public, who draws up an instrument of appeal, containing a short account of the nature of the cause and the sentence, signs it before witnesses, puts his seal to it, and thus it becomes authentic.

Another remarkable distinction between appeals from grievances and those from definitive sentence is, that in the former the appellant is allowed to produce new evidence, under certain restrictions, *non allegata allegare, & non probata probare, modo non obstat publicatio testium*; and the proofs are confined *novis articulis ex veteribus pendentibus, & ad causam pertinentibus*; whereas the appeal from a grievance must be supported by shewing

(49) Clarke in his 55th title explains by examples the meaning of a *gravamen irremediabile*. "*Gravamen irremediabile est quando non speratur alia sententia de hac questione, in eodem iudicio*;" as if the defendant pleaded a release, and the judge, without attention to his plea, admitted his adversary's allegation.

the proceedings of the court, and from the very acts of the judge(50).

It is incumbent on the proctor, unless otherwise directed by his client, to appeal either *apud acta*, or before a notary in *scriptis*; for if he omits to appeal from a definitive, and any damage thence ensues, he is liable to an action by his client.

Appealing *apud acta* may be sometimes necessary to prevent the instant intermeddling of the adversary with the effects; and at others may not be advisable, as if it be apprehended that the judge will assign too short a time to retrocertify (51).

The party appellant must give fresh security, to prosecute the suit, to pay the costs, to appear in judgment, and to ratify and confirm the deeds of his proctor, *de lite proseguenda, de expensis solvendis, judicio sisti, et ratihibitione procuratoris*, for the sureties below are not bound in the cause of appeal(52).

(50) It is a practice unknown in our law (though constantly followed in the spiritual courts), when a superior court is reviewing the sentence of an inferior, to examine the justice of a former decree, by evidence that never was produced below.

(51) See Oughton, title 294. For the advantage of appeals in *scriptis* from interlocutory having the force of definitive, see Oughton, tit. 295.

(52) This necessity of the impugnant's giving new sureties on the appeal, says Clarke, may seem odd, since if

The party, after he has appealed, prays apostles from the judge *a quo*, i. e. short letters dismissory, signed by the judge, stating shortly the case and the sentence, and in the room of further apostles, declaring he will transmit all the proceedings.

At the time when apostles are prayed, and granted, a time is appointed within which the party is to retrocertify to the judge *a quo* what steps he has taken, who otherwise will proceed to execute his sentence. The apostles, when granted(53), are carried to the lord chancellor's secre-

the cause be *remitted* to the court below, the sureties there are bound, as if there had been no appeal; but, says he, you must consider 1st. That upon this last position there has been some controversy. 2dly. Sometimes, though the promovent appeals and succeeds, the cause is not remitted, e. g. where he has recovered too large a sum, and the court of appeal deducts the excess, and gives him his just debt. 3dly. If the impugnant is condemned on the appeal, upon new proofs, in a larger sum than those for which sentence went against him below; in these two last cases, the old sureties would not all be responsible to him. Therefore, says Clarke, in all cases the impugnant, when he appeals, must give new sureties.

(53) If the appeal be in writing, which it always is, if from a grievance, there is no occasion for apostles, as the instrument of appeal itself contains the whole matter of complaint; and where notice is given to the judge of such an intended appeal in scriptis, he cannot put a rule upon the party to prosecute and retrocertify until after the time for appealing is out. The manner of obtaining a commission of delegates, described by Oughton, is somewhat different from that above.

tary, and upon the back of them the chancellor names commissioners, or judges delegates; and the commission being made out, two of them at least must except it, which they having done, issue an *inhibition* to the judge below to stop all further proceedings, and a *monition* to transmit all the past proceedings in the cause to them, which is done accordingly; and this *transmiss* serves in the room of further apostles.

The inhibition contains also a warrant to arrest the party, or is attended with a citation; and these instruments are to be served on the judge, register, and party, and certificate and affidavit of service to be returned.

If the appeal be from a grievance, and it be proved to the satisfaction of the delegates, or admitted by the party appellate, the cause is retained above, and the delegates go on to hear the whole merits(54).

(54) If the respondent in the appeal thinks that the grievance is real, Oughton advises him to avoid further expence by confessing the grievance, and paying the costs incurred on its account; and then, if he were impugnant below, to pray that the whole cause may be retained by the delegates, and that the appellant may proceed therein before them; but if he were the promovent below, he can *oblige* him to do so, because the impugnant who appeals, cannot deny that he consents to the judges above, and makes them judges of his cause.—Oughton, tit. 286.

As the appealing from a grievance is very often a trick for delay, it seems reasonable that either party should have a

The cause must be prosecuted within a certain term, i. e. the appeal proceeded on; and this term is two fold, *terminus juris*, and *terminus hominis*; the latter signifying the limit of time within which the judge has bound the party to proceed, on pain of his otherwise executing his sentence; the other the boundary assigned by the law in case none be assigned by the judge, which is one year, called *primum fatale*, because under some special circumstances a second year may run, called *secundum fatale*, 2 Rob. p. 225(55).

power, by confessing the grievance, to retain the cause above. In the title just mentioned, Oughton would seem to make a distinction between promovent and impugnans, giving greater privilege to the latter; yet in the next title, 287, he gives equal power to a promovent when made respondent in matrimonial causes, or suits for legacies, and lays down a principle, surely extending to both parties, viz. *Appellans, appellando, recusavit, judicem a quo, tanquam sibi suspectum, & minus indifferentem, et consentit pro parte in judicem appellationis.*

(55) If the party serves an inhibition on the judge *a quo*, within the time limited for retrocertifying, that judge's power ceases, and attempts or *attentates* of his afterwards, or during the period given to retrocertify, will be revoked and declared invalid by the judge of appeal. If the appellant, after inhibition served, neglects to prosecute his suit, the appellate may put a rule upon him above; protesting, however, against the jurisdiction of that court to proceed, otherwise to be dismissed with costs, and the cause remitted to the court below.

If the party doth not chuse, or omits to do this, and the appellant doth not proceed during one year, the appellant

The appeal proceeding, an appellatory libel is exhibited: this is contested or answered by the opposite party; the depositions are read from the transmiss, in which all the proceedings below are made up in the form of a book; advocates are heard, and the delegates proceed to pronounce sentence, and according to their judgment decree *bene* or *male appellatum*; and in the latter case approving of the sentence of the judge below, send back the whole cause to him, with all its incidents, to be by him carried into execution; or they may, if they please, though they remit the cause, retain the taxation and enforcement of the costs; and it must be remembered, that all proceedings before the delegates are summary.

*Prohibition.*—If a court errs within the pale of its jurisdiction, it is cause of appeal: if it exceeds its jurisdiction, it is subject for a prohibition(56), which issues out of any of the courts of law, most

may call upon him to shew cause, why the appeal should not be declared to be deserted; and though he appears, and attempts to shew cause, and offers to proceed, may, if he can prove the desertion, stop him, and then the judge declares the appeal deserted, and remits the cause; but for some special reasons, where, in the latter part of the year, the party has been dilligent, and gives some plausible reasons for his delay in the former, a part or the whole of a second year is given to him.

(56) Whatever is here said of prohibitions to the admiralty, may be applied with very inconsiderable variations to the spiritual courts.

usually out of the king's bench, and in time of vacation when the law courts are not open (for a judge cannot grant a prohibition in his chamber), may issue out of chancery, returnable into the king's bench or common pleas(57).

The party must take care not to submit to the jurisdiction of the court, which he doth not merely by appearing, because he cannot tell what the complaint then is till a libel be exhibited(58); but if he answers the libel, without pleading to the jurisdiction of the court and declining it, he cannot afterwards obtain a prohibition, unless the want of jurisdiction appears on the face of the libel itself(59), but if the want of jurisdiction appear on the face of the libel, he may apply for a prohibition even after sentence.

And if the want of jurisdiction do not appear upon the face of the libel, the impugnant should put in a declinatory exception or plea to the jurisdiction, which if it be over-ruled, he files his suggestion in the court of law, stating the circumstances of his case, and shewing them to be out of the jurisdiction of the admiralty, and supporting that suggestion by an affidavit, applies for a prohibition, and may be opposed by counter

(57) 1 P. W. 43 and 476.

(58) In fact, he cannot move for a prohibition before appearance, and a libel exhibited. 1 Salk. 35.

(59) In a court of law, after an imparlance, it is too late to move for a prohibition.

affidavits : but if the point be too nice and doubtful to be determined on mere motion, the court will direct the party to *declare* in prohibition, that is, to prosecute an action, by filing a declaration on a supposition (which is not traversable), that his opponent has proceeded in the court below, notwithstanding a writ of prohibition.

## CHAPTER X.

## ON THE PRACTICE OF THE PRIZE COURT.

It is the duty of the commanders of all ships (and this duty is particularly enjoined in the instructions given to the commanders of ships commissioned) when a prize is by them taken in war, to bring the ships, vessels, and goods so taken, into such port, in some part of his majesty's dominions as shall be most convenient, in order to have the same legally adjudged in the high court of admiralty of England, or before the judge of some other admiralty court, *lawfully authorized*, within his majesty's dominions, according to the place into which the prize may be brought, and if they omit to proceed to adjudication of such their prizes, or unreasonably delay, any persons claiming property in the ships or goods by their proctor, or the king's proctor, or proctor of the admiralty for the king's interest, as the case may be, may obtain monitions to be decreed against the captors, citing them to proceed to adjudication, which if they will not do, the ship will be adjudged to the persons or parties proving an interest.

The prize being brought into port, the next duty of the captors, or their commander, is, as soon as possibly may be, to bring and deliver into the judge of that court of admiralty, to whose jurisdiction the matter appertains, or his surrogate, all papers, passes, sea-briefs, charter-parties, bills of lading, cockets, letters, and other documents and writings which shall have been found on board the prize, which are to be numbered; and their number specified in an affidavit to be made by the taker, or one of his chief officers, or some person present at the time of the capture, and of the papers being found and delivered up<sup>(1)</sup>; in which affidavit it must be sworn that the said papers, &c. are brought in as they were taken, without fraud; or if any are wanting, they must be accounted for, and at the same time the captor should send before the judge, or his lawful commissioners, some principal persons of the ship's company, to be examined upon the standing interrogatories.

These standing interrogatories (a copy of which is to be met with in every admiralty office) are interrogatories which have been drawn up in general terms with great care and accuracy, for the purpose of discovering the truth concerning the interest and property in ships and their cargoes.

(1) This duty is enforced not only in private instructions, but by the act of the 22d Geo. II. on pain of the commander of the capturing ship forfeiting his share of the prize.

In the mean time the ship and cargo are to be carefully kept and preserved, and no sale thereof, and no waste or spoliation to be admitted, nor bulk to be broken, before judgment; and in the plantations abroad they are to be under the care of the collector and comptroller of the customs, or where there is no comptroller, of the naval officer.

The ship's papers being introduced, with the usual affidavit, the judge, at the petition of the captor's proctor, decrees, the usual monition against all persons in general having, or pretending, to have, an interest, &c. &c. The examinations of the witnesses to the standing interrogatories, or in *prepatorio* are taken by the judge, or such person or persons as are by him appointed for that purpose.

This examination must be finished within five days, and the monition issued and executed in the *usual* manner, within three days after request made in that behalf to the judge or other person thereto authorized.

If within the space of twenty days after the execution of the monition(2), no person appears to dispute the legality of the prize, or if within that time a claimant appears, but doth not within five days from the time of entering said claim give security to pay double costs in case the vessel be

(2) So I understand the act. It is oddly worded; the words are, if no claim be entered, giving twenty days notice of the monition.

adjudged lawful prize; the ship or vessel must immediately, or with all convenient speed, be condemned, or acquitted and discharged, upon the evidence of the ship's papers, if such there are, or of those found on board any other ship regarding the capture, and of the examinations *in preparatorio*.

If within twenty days a claimant appears, and gives in his claim in regular form, and within five days from the time(3) of entering the claim, gives sufficient security to pay double costs in case his claim be defeated, and upon the examination in preparatorio, and ships papers being produced, there appears no occasion to go into any further examination; the judge is, within ten days, if possible, to proceed to sentence.

But if the court be not satisfied from the ship's papers, and the examination on the standing interrogatories, and still have doubts whether the capture be lawful prize or not, and it shall appear necessary to the judge to have an examination of witnesses on *pleadings* given in by the parties, and admitted by the judge, and such examination be desired and the capture still disputed, he orders such examination accordingly, under the well-known phrase of further proof, the parties put in their pleadings, and the cause proceeds upon plea and proof, though

(3) This was omitted in the old prize acts, so that it did not appear from whence the five days were computed.

sometimes the judge may order further proof of a less solemn nature, without pleadings being filed or put in. The proceeding by plea and proof is of the most solemn kind.

Where the parties are put to plead, the claimant's proctor may pray that his adversary shall alledge, and is also to alledge himself, both parties being plaintiffs or claimants, and the proceedings go on to sentence, as in other summary causes, according to the course of the civil law, as may be seen by the rules in a cause given in the note beneath(4); and having been already

#### (4) PILLANS v. THE VICTORIA.

King's proctor first introduced the ship's papers, with an affidavit annexed, and the judge decreed the usual monition against all persons in general, &c. &c.

Next day. King's proctor produced witnesses on the standing interrogatories.

Next day. Upon affidavit a commission issued to the marshal to unload and store the cargo of said ship.

Next day. More witnesses produced to the standing interrogatories.

Next day. D. F. Proctor exhibited two claims for J. Martin, with affidavit annexed, and gave security to pay double costs in case the ship and goods should be condemned as lawful prize.

Next day. Three more claims for three other persons exhibited in like manner by D. F.

Next day. A commission of valuation and appraisement of the ship and goods claimed by Martin, decreed at his proctor's petition.

Next day. King's proctor returned the monition above-mentioned, and the certificate of the execution of it was

delineated in the last chapter, it is unnecessary to repeat them here.

On the evidence however to be given in these prize causes, and the mode thereof, and the cases in which further proof is usually granted or denied, some observations are necessary; but we must first pause a moment to consider the provision which is made by the prize acts when it is thought necessary to order such further proof or examination of witnesses upon pleadings, to prevent the ship and cargo from perishing by such delay. A commission for unlading issues, and the judge causes the capture to be appraised by skilful persons, named by the parties, and appointed

continued as to all persons not appearing, till next court day; and king's proctor, at claimant's proctor's petition, was assigned to allege.

Allegations on both sides contested negatively. Witnesses examined to interrogatories. Depositions published. Exceptions to the promovent's witnesses' depositions. A term probatory on the exceptions. A corroborative matter, which was by the impugnant contested negatively, and promovent restrained to the term of law for proof thereof. 1st. Term probatory lapses to the corroborative matter. 2d. Term probatory lapses. Publication decreed. This was the 11th Dec. 13th Dec. a day for hearing is appointed. 18th. Cause begins to be heard. 25th. Sentence of condemnation passed. But in common and ordinary cases there are no allegations; the captor presents a petition, the examinations in preparatory are taken—the usual monition issues—a claim is put in with attestations; and on the ship's papers, and the other evidence, sentence is given.

by the court, and an inventory of them being first taken, if the judge thinks necessary, by the marshal or his deputy, and they put into warehouses with separate locks, of collector and comptroller; or if no such persons, of the navy officer, or agents of the parties, at the charge of the party desiring the same. Then, within fourteen days after making the claim, the judge shall proceed to take security from the claimants to pay the captors the full appraised value of said goods, in case they be adjudged prize; and from the captors to pay costs, in case of a converse decision, and shall then make an interlocutory order for delivering the same to the claimants, or their agents; and if the claimants will not give such security for the value of the goods, the judge may take it from the captors, conditioned to pay the claimants, if the goods be not condemned, and then, on an interlocutory order, cause them to be delivered to the captors. And if such security be refused, and the cargo be perishable, a commission of appraisement and sale may issue, and by 41 Geo. III. ch. 96, in the instances shewn therein, it may be sent by vice-admiralty courts abroad, to England for sale(5.).

I proceed now, according to the promise above, to make some observations on the general nature

(5) By 41 Geo. III. ch. 96. in such case the proceeds are not to remain in the hands of the captors, but to be brought into the registry, if it be a vice-admiralty court.

of the evidence in prize causes, on the mode of giving it, and the grounds for granting liberty of further proof.

The evidence to acquit or condemn, with or without costs or damages, must, as we have seen, come in the first instance from the ship's papers, and the examination of the master and other principal officers, upon general and impartial interrogatories, for which purpose there are officers of admiralty in all the considerable sea-ports of maritime powers.

A claim put in in opposition to the captors, must be supported upon oath, at least as to belief; it is made in a certain usual form(6); substitution of interests is sometimes allowed therein, and it may be barred by illegality of traffic(7).

Some of the grand circumstances, which, if proved, go strongly to condemn the ship, or at least to excite strong suspicion, are the want of complete and proper papers, the carrying false or colourable papers, the throwing papers over-board, prevarication in the master and officers examined in preparatorio, spoliation of papers, the master not knowing who the owners are, or not being able to give an account whose property are the ship and cargo, the national character and domicile of the master. His conduct, and

(6) See the form in an Appendix to 2d Robinson; and a faulty deviation from it, same book, p. 170.

(7) See 2d Robinson, p. 83 and 85.

that of the vessel herself; the time when the papers were composed, with many others creating greater or less degrees of suspicion according to their nature.

The duty of the commissioners, or examiners, in taking the evidence is regulated by the prize act, and certain passages in the instructions given to cruisers. They are appointed by the court, though the court may accept the recommendation of parties for its own convenience. They represent the court, performing certain functions of the court, and they may be revoked or continued at the discretion of the court.

The commissioners are bound to receive every ship's paper, and not to take upon themselves to judge whether they are of importance or not. they are to take care not to examine witnesses produced at an irregular time; and when the depositions have been taken or transmitted, are not to go on examining afterwards, as has sometimes happened.

We come next to consider the allowance of *further proof*, where the court is not satisfied with that originally produced, and to state the manner in which it is made, the circumstances which affect it, or by which this privilege of the claimants is forfeited, and the effects it produces.

Proof in ordinary cases may consist on the part of the claimant of attestations, letters of orders and advice, invoices and bills of lading, and the

like. If further proof be ordered for want of these, or because they are not sufficient, it may be either required in general terms, or required to be of the most solemn nature by plea and proof. In the last mode, all the proof that the case can supply is demanded, each party has an opportunity of stating his case in a distinct allegation, and is called on to support it by the best proof the nature of his case can afford.

Further proof then by plea and proof opens the case to both parties, but where it is only ordered from the claimant in general terms, (in which case it is usually proof by affidavits, though they are not always sufficient), further proof by affidavits to be exhibited on the part of the captor, is only admissible under the *special direction* of the court.

This privilege of further proof allowed, is forfeited by the claimant if he appear to be guilty of fraud(8), or *mala fides*, or violation of the laws of neutrality. It is justly said to be the privilege of honest ignorance, or honest negligence.

When further proof has been ordered, and the cause has undergone a trial of this nature by plea and proof it is final; and no second reference is ever made for further proof(9).

(8) Such as false claims, false papers, or spoliation.

(9) 1 Robinson, p. 37.

If either party be dissatisfied with the definitive sentence, or interlocutory decree, having the force of a definitive, passed by any court of admiralty or vice-admiralty enabled to try prize, he may appeal within fourteen days after it is pronounced, to the lords commissioners for hearing appeals in causes of prize, giving good security to prosecute the appeal, and answer the condemnation and costs if the sentence shall be confirmed; but its execution is not to be suspended, if the party appellate give good security to restore the ship or goods, or the full value thereof, if the sentence be reversed.

The appeal must be prosecuted within a reasonable time, and this was *before* the statute of 38 Geo. III. ch. 38. by taking out the usual inhibition within three months after sentence in the high court of admiralty, and within nine after sentence in any of the vice-admiralty courts; but the time is extended by that act in all courts to twelve months<sup>(10)</sup>, within which, if the inhibition be not taken out, the sentence stands confirmed without power of reversal, unless the time be enlarged by his majesty's special order in council.

When such his majesty's special order is given,

(10) By that act, where decrees had been already given, and no appeal interposed within nine months, the captors not compellable to make compensation.

if distribution be made after the time of appealing would be out if no such order had been made, the captors are not compellable to make compensation(11).

If a person not a party in the first cause intervene by appeal, he must by statute law at the same time give in his claim, otherwise his appeal is null, and pray the usual inhibition within one year, after which he is not entitled to an appeal(12).

When an appeal is interposed, the court of admiralty, at the request of either captors or claimants, is by statute(13) bound to order the capture to be appraised, and on security being given for the value, to deliver it to the party giving such security; and if there be any difficulty or objection as to the security, may order the goods and effects to be entered, landed, sold,

(11) By the same statute, 38 Geo. 3. ch. 38. In such case captors on request of claimants deliver accounts of sales to his majesty's procurator general, otherwise they lose the benefit of the act. The procurator general to defend in such appeals, in such manner as his majesty's advocate-general shall direct.

(12) See 33 and 38 of the king, above-mentioned.

(13) See prize act, 1793, and the statute 38 Geo. III. ch. 38. Some modifications calculated for the meridian of the West Indies, as made by the act 41 Geo. III. ch. 96. will be given in the chapter of Vice-Admiralty Courts.

and the money brought into court, and then deposited in the bank of England, or, by consent, in public securities, in the name of the register, and of trustees chosen by the parties and approved by the court; and if the security is given by claimant, the judge is to give the vessel a pass to prevent its being taken.

## CHAPTER XI.

## OF THE ADMIRALTY AS A CRIMINAL COURT.

THE criminal jurisdiction of the admiralty was formerly very important. Its criminal court was held before the lord high admiral, or his deputy, stiled judge of the admiralty. It had, according to Sir W. Blackstone, cognizance of all crimes and offences, the sessions of admiralty now hath, committed either upon the sea, or on the coasts out of the body or extent of any English county, and of death or mayhem happening in any great ship, being in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens(1); such says the commentators, as are the ports of London and Gloucester.

This court having proceeded conformably to the civil law, without jury, so that a man might

(1) Yet we find constant instances to the contrary; the trial for the murder of Sir John Goodere, at Kingroad, Bristol, by his brother, a captain of a man of war, reported in the State Trials; and Bradfoot's trial for murder at the same place, reported in Foster's Crown Law, were both before ordinary commissions of gaol delivery, and not at an admiralty sessions.

be deprived of his life by the opinion or caprice of a single judge, and having also, according to the same law, required confession, or *two* witnesses, so that the guilty might often escape<sup>(2)</sup>; the English nation became uneasy under its authority, and having in vain attempted to invade it in the reign of Henry VI. at last succeeded in obtaining the act of parliament, 28 Henry VIII. ch. 15. which enacted, that offences upon the seas should be tried by commissioners of oyer and terminer, under the king's great seal; namely, the admiral or his deputy, and three or four more, (among whom two common law judges are usually appointed) the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury; and that the course of proceedings should be according to the law of the land. This is now, says Blackstone, the *only* method of trying marine felonies in the court of admiralty: the judge of the admiralty still presiding therein, as the lord mayor is the president of the session of oyer and terminer in London. And yet how far the old common law criminal court of admiralty be extinguished, or remain concurrent, at least as to misdemeanors, may well be a question as to this ancient court and its practice<sup>(3)</sup>.

(2) This rule of the civil law seems to have been intended in mercy, but it often was the cause of cruelty, by introducing the rack to extort confession.

(3) See Appendix, No. 3.

And by this act, and 27 Henry VIII. ch. 4. these offences may be enquired of, heard and determined in such shires and places in this realm, as shall be limited by the king's commission, as if such offences had been committed upon land.

In Ireland a similar statute was passed in the eleventh year of James I. ch. 2.

By the same statute, 28 Henry VIII. the jury is to be of the inhabitants of the shire, and no challenge to be for the hundred; and such as shall be convict of any of the offences mentioned in the statute, viz. of treasons, felonies, robberies, murders, and confederacies upon the sea, or in any haven, river, creek, or place, where the admiral hath, or pretends to have, jurisdiction, shall suffer such pains of death, and losses of lands and goods, as if they had been convicted of the same offences done upon land.

Subsequent statutes giving authority to the admiralty, will be mentioned under the head of piracy. Before the above-mentioned statutes were passed, it appears by the well-known articles, *Magistri Roughton*, that it was customary for the admiral to make circuits, to summon juries of twenty-four men to inquire into a vast variety of naval offences, and to punish even with death.

By a very late act, regular times are appointed for the sitting of the court of admiralty at the Old Bailey, viz. twice in the year. See the Prize Act of 1793, 33 Geo. III. ch. 66.

Our business then is to enquire what is the law which governs the court of admiralty sessions, what the extent of its jurisdiction, and what its practice.

To the first the answer is easy. Whatever is treason, whatever is felony, whatever is a misdemeanor, whatever is a nuisance or an offence, whatever is misprision or an abuse committed upon the land, the same thing being committed upon the sea, or within the limits of this commission, must be reputed and adjudged treason, felony, misprision, offence, misdemeanor, nuisance, and abuse, &c.(4); it is the same thing, it carries with it the same guilt, and it is liable to the same kind of punishment, with one remarkable exception, that wherever a prisoner would at law be found guilty of manslaughter, he was in the admiralty acquitted(5). But this has been altered by a late act, 39 of Geo. III. ch. 37, which puts this crime on the same footing as if committed on shore; and conceiving differently from Sir Lionel, that the law previously extended only to treasons, felonies, and confederacies, enacts, that all offences on the seas shall be liable to the same punishments as the like crimes on shore.

One marine crime, however, demands our peculiar attention, on account both of its enormity,

(4) Sir Lionel Jenkins, 1 vol. xcvii. and see the 27th article of Magistri Roughton.

(5) This appears to be derived from the civil law. See ante, the chapter on Public Wrongs.

and of its being almost confined to the seas: I mean that of piracy.

Piracy is depredation without any authority from any prince or state, or transgression of authority given, by despoiling beyond its warrant. A nation never can be deemed pirates. Fixed domain, public revenue, and a certain form of government, exempt from the character(6). The States of Barbary, therefore, are not treated by Europe as pirates.

Mr. Woodeson seems to think that a commission from a foreign prince screens from the imputation of piracy, as in Cheline's case(7); surely not, if the commission be wantonly exceeded: but at all events, our statute law punishes with death, and considers as piracies, depredations committed by his *majesty's subjects*, under colour of foreign commissions(8).

The most interesting questions which offer themselves on this head are, whether piratical taking can alter the property—whether all non-commissioned captors are pirates—and to whom the goods of pirates belong.

It is an universal principle of the law of nations, that the spoil never vests in piratical captors, and cannot be by them transferred to third persons, but must be restored to the original owners on sal-

(6) Cicero Philipp. 4.

(7) 2 Sir L. Jenkins, 754.

(8) 11 and 12 Will. III. ch. 7. and 18 Geo. II. ch. 30.

vage ; but it is said there is an exception if sold in market overt, at least unless the pirate be legally convicted. Now this plainly cannot be, for no sale can be valid without a legal condemnation(9), according to the English rules, and that in a piratical case never can be had.

Unlawful depredation is of the essence of piracy. How, therefore, any question could ever have been made, as to captures by persons from land seizing enemies ships in our ports, or by merchant ships at sea defending themselves when attacked, which captures become droits of admiralty when statutes do not interfere, doth not seem clear.

The goods of pirates, not taken from others, by the common law belong, after attainder, to the crown or its grantee(10) ; and so do the spoils of others found on board, unless claimed within reasonable time. But by statute(11), merchant ships successfully fighting against pirates are allowed to share in the prize like privateers.

The statutes more particularly relative to piracy are the following : First, 11 and 12 Will. III. ch. 7. now perpetual, which empowers commissioners under the great seal, or the seal of the admiralty, in any part of his majesty's dominions, to try piracies, felonies, and robberies, committed in places within the admiral's jurisdiction ; the trial to be had on shipboard or upon land, as occasion may require.

(9) Burrow. 694—5.

(10) 3 Bul. 148.

(11) 22 and 23 Ch. II. ch. 11.

The same act punishes with death piracies committed by any of his majesty's subjects, upon others his majesty's subjects, under colour of commissions from any foreign state(12). Also, all accessaries in piracy, by confederating with pirates, receiving goods from them, preventing resistance to them, or in any other mode therein enumerated; and it gives large rewards for vigorous defences against pirates(13).

By 4 Geo. ch. 11. all persons who shall commit any offences for which they may be adjudged pirates by the statute of William, may be tried as by the act 28 Henry VIII., and are debarred the benefit of clergy.

By 8 Geo. I. ch. 24. since made perpetual, all persons made accessaries by the statute of William are declared principals, and the cases constituting piracy extended.

I know not where so well to take the extent of the criminal jurisdiction of the admiralty as from the celebrated charges of Sir Lionel Jenkins, who in fact almost repeats the articles of Roughton.

He begins by stating the scope and end of the commission, which is to enquire of, hear, determine, and punish all crimes, misdemeanors, of-

(12) See 18 Geo. II. ch. 30. To the same purport persons tried under it, are not to be tried again in Great Britain. Not tried under it, may; as for high treason.

(13) By the 8th Geo. I. seamen maimed in fight with pirates, besides the other rewards, shall be provided for in Greenwich hospital.

fences, and abuses, either against the dignity of the king, against the peace and good government of the kingdom, or against the rights and security of the subject, when and as often as such crimes and offences happen to be committed upon the sea, or in some haven, river, creek, or place, where the admiral hath power and jurisdiction.

He then observes, that besides the four seas(14) which are the *peculiar* care of the crown of England, the king has a concern and authority, in concurrence with all other sovereign princes who have ships and subjects on the sea, to preserve the public peace, and to maintain the security of navigation all the world over. So that not the utmost bound of the Atlantic Ocean, nor any corner of the Mediterranean, nor any part in any sea can prevent, but that if the peace be violated upon any of his subjects, and the offender be afterwards brought up, or laid hold on, in any of his majesty's ports, such breach of the peace is to be enquired of, and tried in virtue of a commission of oyer and terminer, in such county or place as his majesty shall please to direct; and whatever obligation his majesty has to have the peace duly preserved upon

(14) The *quatuor maria*, as they are called by foreigners, and in modern treaties the British seas, are those which surround Great Britain:—1. the Channel south, between England and France; 2. the Irish or St. George's Channel, and the Dencaledonian Sea, washing the west of Scotland; 3. the Caledonian, on the north of Scotland; 4. the German Ocean, washing the east of Britain.

land, the same he hath at sea, since trade cannot flourish without security, and shipping and navigation must decay with decaying commerce.

He then insists, as he had done in other places with respect to the civil jurisdiction of the admiralty, that the enquiries and presentments in this court are to be of things done upon the sea, or in any haven, river, creek, or place, where the admiral hath or pretends to have power, authority, or jurisdiction. The word pretend, he observes, has been thus commented upon by Lord Coke, and the uncertainty it seems to import cleared up, that between the high water and low water-marks, the admiral hath jurisdiction *super aquam* when the sea does flow, and as long as it flows, but the land is *infra corpus comitatus* at the reflow; so that of one place there is *divisum imperium* at several times. But not content with this exposition, Judge Jenkins insists on the words of the commission, which directs enquiry of things done not only upon the sea, and in havens, creeks, and rivers, as in the statute, but also in all places whatsoever within the flowing of the water, to the full sea-mark; and in all great rivers from those bridges downwards that are next the sea(15).

(15) Here Sir Lionel is certainly too positive. The river at Limehouse, Deptford, and Gravesend, has been determined to be *infra corpus comitatus*, and the admiralty

He then proceeds to consider the particulars which come under the cognizance of this criminal court, which he reduces to three heads.

Under the first he places treasons, felonies, robberies, murders, and confederacies, upon the high seas, &c. which are the words of the statute of Henry the Eighth, which statute is the ground of the commission.

Under the second, those offences and misdemeanours which were made so by several other statutes recited in the commission, for the due observation of which the court were made justices of peace and gaol delivery, in those cases where the transgression is on the water: under that head he reduces those things which are offences and misdemeanours at common law; being enquirable and presentable when they are committed upon the sea, or within the limits of the commission.

Under the third head, he reduces those misdemeanours and abuses that are contrary to the ancient laws and usages of the sea, and contrary to the particular constitutions and ordinances of the admiralty of England; for the commission directed those things to be enquired of there also, though they be punished solely before the admiral, or his lieutenant, in the court of admiralty.

there not to have jurisdiction, save as to death or mayhem; and quere as to them, for Kingroad, Bristol, is much more the sea, and murder there has been tried in the recorder's court.

He begins with those of the first rank, the blackest and most heinous enumerated by statute of Henry the Eighth—treasons, felonies, robberies, murders, manslaughters, and confederacies. He makes no observation that is new until he comes to confederacies; but from thence his charge is so particular and curious, that I have thought it best to repeat it verbatim, especially as his work, though so valuable, is now become very scarce, and of no small price.

“You are, says he to the jury, to enquire if any ship-carpenters, or other workmen, being employed to work in any haven, port, or creek, or in any place within the flowing or reflowing of the water, for the building, repairing, or fitting out of ships, have confederated not to work under such and such a rate; or not to work but at such hours of the day, or else not to finish a work that another hath begun. This was anciently felony in some trades, and it is still severely punishable(16).

(16) By statute 33 Geo. III. ch. 67. if seamen, keelmen, ship-carpenters, or other persons, riotously endeavour to hinder or deter other seamen, ship-carpenters, &c. from working at their business, they are to be imprisoned and kept at hard labour for a time not exceeding twelve months. Second offence felony, with transportation. Maliciously burning a ship, felony without clergy. For destroying or damaging without fire, transportation. All these offences, if committed on the high seas, are triable at the admiralty sessions, as also the riotously opposing the loading, unloading, or sailing of ships.

“You are to enquire of such masters of ships and others, as have colourably, and by fraud and confederacy with foreigners, gotten foreign bottoms, or ships to be made free, while foreigners have any interest in them. You are to present those ships and the confederates. Or if any have confederated, and taken in on board them any goods or merchandizes to be exported, or else to be imported, in *fraudem legis*, and contrary to the true intent of the several acts made, since his majesty’s most happy restoration, for the encouragement of navigation.—Or if any being upon the water, have confederated and received goods or merchandizes on board them, or else delivered out goods or merchandizes from on board them, without paying his majesty’s customs: this we are likewise enjoined, by an ancient constitution of the admiralty, to enquire after with all diligence. If any seamen, officers, or common mariners, have either upon the sea, or in any port (especially in any foreign port), by mutinous words or practices, invited each other or conspired together, to oppose or disobey their commanders(17), or to obstruct or hinder any

(17) This may be so still as to merchant ships, but on board his majesty’s ships of war such offences are now tried by courts martial. See 19th and 20th of the articles of war in the statute 22 Geo. II. by which mutiny, on conviction by a court martial, is punished with death. Concealment of mutiny and seditious words, with death, or such other punishment as the court direct. But see 37 Geo. III. ch. 70.

service they were upon, especially to hinder or break any voyage in hand; I say, such confederacies are intolerable, it is the dishonour of our nation, the ruin of our merchants, and the destruction of our trade; therefore to be enquired after most diligently, and to be punished most severely.

“There is another sort of confederacy much more dangerous than all this, because it involves in it a public affront to the crown and dignity, to the right and sovereignty of the king, and also a public disgrace and reproach to this nation. It is when foreigners privateers, or others, do confederate and refuse to give and allow to his majesty his ancient right of the flag upon his four seas(18), his un-

(18) Sir Lionel Jenkins has given us a memorable example, in which he was personally concerned, of this right of the flag, carried to an extraordinary length early in Charles the Second's reign. The Cleaveland English yacht, on board which he was himself, being at anchor close to the town of Brill, in Holland, a government yacht belonging to the States of Holland, having on board ambassadors going to England, passed without striking her flag, and soon after, being close on board a Dutch man of war, the States' flag was changed, and hoisted at the man of war's top-mast-head. The captain of the English yacht asked Sir Lionel what he should do, who told him that even old Van Tromp had struck to Lord Arundel in Goree road; upon which the English yacht fired three shot at the man of war, one under her forefoot, another over the poop, and a third between the masts. The Dutch ambassadors on this sent a message, ex-

doubted right of sanctuary in his ports and other places of safety, commonly called the king's chambers; or when they conspire to disallow his right of safe conduct to such ships as his majesty shall grant his royal letters of safe conduct to pass these seas, in a time of war as this is. All these are direct confederacies against the king, to usurp his rights, and by degrees to encroach upon a possession the most constant, uninterrupted, and ancient in the whole world.

“You are therefore to enquire if any foreign ship, man of war, or other, being met with in any part of the four British seas, hath refused to strike her flag, and lower her top-sail to any of his majesty's ships or vessels carrying his majesty's flag, ensign, or jack. Or if any captain or commander of any ship or vessel, carrying the king's flag, jack, or ensign, hath not demanded that respect due to the king's colours; when it was delayed, or refused, or not paid at the due time, and after the accustomed manner, and hath not pursued such refusers as pirates. Or if any foreign men of war have pre-

pressing much surprise, and saying that they were not to strike their flag, being in their own ports. But the business terminated in the Dutch man of war striking the flag, though it was that of the States.

Bynkershoek admits the superiority of the British fleets, and that the Dutch were by treaties bound to strike their flag in all the sea, *inter Septentriones, & promontorium cui nomen finis terræ*, but thinks this particular act was intended to provoke a war.

sumed to wear any of his majesty's colours, or the colours of any prince or nation, saving their own, in these seas, which is ever the true badge of a pirate, and those that do it, are to be pursued as such.

“The next thing is the right of sanctuary and safe conduct, which the king hath time out of mind exercised, not only in his harbours and ports, but especially in his chambers(19).

“You are therefore to enquire if any men of war, under foreign commissions from any of the parties now in war, do lie hovering near any of his majesty's ports, havens, or harbours, or skulking within any of those spaces called the king's chambers, in order to surprize merchants ships belonging to the king's friends and allies, and to snap them as they are coming in or going out of our ports: you are to present such, if you know any, and the king's majesty is to be informed of it out of the records and presentments of this

(19) The king's chambers are those tracts of sea which are between some of the most eminent promontories or points of land (a strait imaginary line being drawn between them), for instance, between Flamborough-head and the Storn—between the North Foreland and the South Foreland—between Portland and the Start—between the Land's End and Milford: those chambers being so reputed time out of mind, and so returned in the year 1604 by jurors, on their oath, to the court of admiralty. See in Sir L. Jenkins, 732, 2 vol. a question arising on a capture of a Spaniard by a Portuguese in one of the king's chambers.

court, that they be seized and arrested, if they be driven or do come in, or else may be fetched in by his majesty's ships, and punished as wilful violators of the treaties his majesty hath with his neighbours, and as malicious disturbers of our trade.

“You are to enquire if any men of war have presumed to search, stop, or carry away by force, any merchant ships in their course at sea, under pretence of suspicion that they belonged to their enemies; if they have brought them out of their course to their own ports without sufficient cause<sup>(20)</sup>, such as is allowed of by treaty between his majesty and the prince or state from which the man of war hath his commission; that is a grievous trespass, and the party that hath done it, coming into any of his majesty's ports may be arrested, and his ship made to answer and satisfy the merchant's damage. If they have robbed or pillaged them, it is downright piracy, as I have already told you.

“You are to enquire if any foreign men of war have broken the safe conduct granted by his majesty to any of his allies within the four

(20) In Sir L. Jenkins's opinion, even if a foreigner carry away a ship belonging to his majesty's allies, out of one of our ports, it is an offence enquirable and triable before the admiralty commissioners of oyer and terminer, and punishable with fine and imprisonment, vol. 2. p. 754. Some offences of this kind, by our own captains, have been in modern times punished by the admiralty court.

seas(21), or have presumed to fight or act hostilities against each other, when any of his majesty's men of war in sight, and had given the signal to forbear and keep the peace. These rights of the flag of giving sanctuary, protection, and safe conduct, are emanations of his majesty's sovereignty in these seas, and where you know of any thing done to the infringement, or in derogation of them, you are to present and specify the particulars, to the end they may be laid before his majesty, that he may, in his royal wisdom, provide some remedy and redress, either by giving orders to his men of war at sea, or to his officers in port, to arrest such ships and commanders as shall have offended in any of these particulars, or else may, by his ministers and ambassadors abroad, demand such reparation and satisfaction as by the law of nations is due.

“Having done with the crimes and offences specially directed in the statute of Henry VIII. we proceed to those to be enquired of upon other statutes(22) related to, and specially cited in the

(21) We have before defined the four seas. In a treaty in 1674, between England and Holland, the English dominion of the sea was agreed to extend from Vanstaten, in Norway, to Cape Finisterre.

(22) The statutes here attended to are so very numerous, that I find it necessary to refer the reader to the *Articuli Magistri Roughton*, affixed to the last edition of *Clarke's Practice*, where most of them will be found under the respective heads which they concern.

commission, for the due execution of which the justices of that court are specially appointed by his majesty to be his justices of peace and gaol delivery.

“You are to enquire of all nuisances and abuses upon our salt waters and navigable rivers beneath those bridges that are next the sea(23); by erecting of water-mills, wears, stakes or kiddles, whereby the free course and passage of boats and vessels is hindered, or the young fry of fish destroyed; and you are to present as many as are within the limits of that commission(24).

“You are to enquire of all such as have cast ballast, rubbish, or filth, into our navigable rivers below the bridges next the sea(25), or have laid any stones for lighters or other boats in the river of Thames, and not laid them a yard deep in the ground, for by that means our harbours and channels come to be choaked up, and the passing and riding of ships at anchor become daily more and more unsafe.

“You are to enquire of all such as use any unlawful arts, engines, nets, or means to catch fish

(23) Punishment, by 7th article Magistri Roughton. Fine at the discretion of the admiral.

(24) See statute 9 Henry III. ch. 23. 4 Henry IV. cap. 1. 45 Edward III. cap. 2. 1 Henry IV. ch. 12. 12 Edward IV. cap. 7.

(25) See 24th of the articles aforesaid from the Liber Niger; and stat. 34 and 35 Henry VIII. cap. 9.

withal upon the sea, or below the lowest bridges, contrary to the statutes in that behalf provided(26), and contrary to the ancient ordinances of the admiralty; likewise such as do destroy fish out of proper seasons, or while they are of an unsizable growth, and particularly such as dredge for oysters between the 3d of May and the 14th of September, that is out of season, prefixed by the ancient statutes of the admiralty(27)

“You are to enquire of all forestallers(28), regraters, and engrossers of our merchandizes and provisions, while they are yet upon the sea, or in our rivers, in the way to our ports or markets, or who divert them from coming to market, thereby to keep up the rate of their commodities. This was anciently felony in some cases, and is still severely punishable by law.

“You are to enquire if any use false weights and measures upon the water; if any customers or comptrollers have ships of their trafficking; if any

(26) 4 Henry IV. cap. 11. 13 Edward I. cap. 47. 13 Richard II. cap. 19. 17 Richard II. cap. 9. 1 Eliz. cap. 17. 2 Henry VI. cap. 15.

(27) See 12th article, Magistri Roughton. Punishment, fine at the admiral's discretion.

(28) See 16th article Magistri Roughton, by which the penalty was half a years imprisonment; and the statutes 27 Edward III. ch. 11. 28 Edward III. ch. 13. 31 Edward III. ch. 13. 5 and 6 Edward VI. ch. 14. 5 Eliz. cap. 13. 13 Eliz. cap. 25. 21 Jac. cap. 22. 3 Car. I. cap. 4.

do hire and employ foreign bottoms, where there is plenty of our own to be had at reasonable rates(29). Or if any Custom-house officers, water-bailiffs, and others, do exact or receive any illegal fees or gratuities upon the water, to the dishonour of the government, and to the prejudice of our ports in the point of trade. Touching this, we have a special constitution of King John's in the admiralty, enjoining, that strict enquiry be made after such exactions and extortions.

"You are to enquire, if any persons have possessed themselves of goods or merchandizes cast away by storms, or else stranding, bulging, or splitting against rocks, when any living creature, (though but a dog or cat) is escaped with life out of the ship or vessel so cast away ; such goods are no wreck, the custody of them belongs to the admiral, and they are to be restored to the proprietors without any fees or salvage, but what the pains and labour of those that saved them may reasonably deserve(30).

(29) Sir L. Jenkins here points out one of the great principles on which exceptions are allowed to the navigation act, but then that exception must be made by law, and not left to the individual : thus in the present reign numerous statutes have passed to permit the carriage of certain commodities, and acts of indemnity for those who have permitted it, e. g. for West India governors, 36 Geo. III.

(30) Of this we have treated before in the chapter of Droits.

“You are to enquire of such masters of ships as have willingly or wittingly received any silver, gold, plate, or bullion on board them, to be transported over sea, or any commodity prohibited by law to be exported, either absolutely or without licence, out of the kingdom(31).

“You are to enquire if any masters or commanders of merchant ships, meeting with Turks, pirates, or sea-rovers, have yielded up their ships(32), or suffered any goods or merchandizes to be taken from them without fighting, unless it were in a case where the enemy had more than a double force to theirs; or having ships of two hundred tons burthen or upwards, and mounted with sixteen guns or more, have yielded to any force whatsoever without fighting, such masters are to be declared for ever incapable of taking the command of any English ship upon them; and if they do, then to suffer imprisonment during the space of six months for each offence. Or if such masters of ships have accepted of any freight, reward, or gift, from such Turks or

(31) Receiving on board his majesty's ships any goods, other than for the use of the ship, except gold, silver, or jewels, or except goods saved from shipwreck, unless by order of the admiralty, is, by the 18th article of war, punished by cashiering, and incapacity to serve.

(32) This is evidently to prevent fraud or collusion. The history of the times will shew why Turks and pirates are so specially mentioned. See further penalties for not resisting pirates in 8 Geo. I. ch. 24.

pirates, either in money or goods; their part of such ship (if they have any in it) and all they are worth, is to go to repair the merchants' damages.

“You are to enquire if any mariner, in these cases of meeting with pirates, hath declared or refused to join with their master and commander to fight and defend their ship(33); or if any

(33) By 8 Geo. I. ch. 24. if any commander or other officer or seaman of a merchant ship which carries guns or arms, shall not, when they are attacked by a pirate, fight and endeavour to defend themselves, or shall use any words to discourage the other mariners, and by reason thereof the ship shall fall into the hands of the pirate, every such commander, &c. shall forfeit all the wages due to him, and suffer six months imprisonment.

And by this statute, and 11 and 12 William III. ch. 7. assisting a pirate, or trading or corresponding with him, are offences punished with death.

In his majesty's navy, by the articles of war, negligence, cowardice, or disaffection in the commander, and disobedience of orders in those under him, are punished with death. So is refusing to act on pretence of arrears of wages, or any other such reasons. The punishment of cowardice, negligence, or disaffection in the inferior officers and crew, is left to the discretion of courts martial.

The offences of not resisting Turks and pirates were first noticed by statute 22 and 23 Charles II. ch. 11. which makes the captain, on proof in the court of admiralty, incapable of taking charge of any English ship; and if he doth, subjects him to six months imprisonment. If any thing be allowed or paid him back by the Turk or pirate, gives an action *in the admiralty* to the owners of the cargo,

mariner has laid violent hands on his commander, thereby to hinder him from fighting, this is made felony. Or if any master of an English ship, being at sea, and having discovered any ship that had hailed him to be a Turkish ship, pirate, or sea-rover, hath departed out of his ship, and gone on board such sea-rover, thereby hazarding his own ship, by his detention on board the other. Or if any masters of ships have insured their ships, or taken upon bottomry greater sums of money than the value of their adventure, and have afterwards wilfully cast away, or otherwise destroyed their ships, or procured it to be done by others, this is felony.

“The next things I shall commend to you, are some few things that are made enquirable by the laws of the sea, and the ancient constitutions of the admiralty.

“The first relates to the flag: you are to enquire if any masters or commanders of merchantmen, have presumed to wear his majesty’s jack, commonly called the union-jack, in shape or mixture of colours approaching to it, so that it cannot be easily distinguished from the king’s jack; or any other flags, jacks, or ensigns whatsoever, than those usually worn on merchant ships, viz. the flag and jack white, with a red cross, commonly called St. George’s cross, passing quite through the same, and the ensign red, with a

to be repaired out of it; and empowers all captains of English ships, by virtue of process *out of the admiralty*, to seize the ships of masters so offending.

cross on a canton, white within the upper corner thereof next to the staff.

“And if any of our merchantmen, English, Scotch, Irish(34), or belonging to any of his majesty’s dominions and plantations, meeting with any of his majesty’s ships or vessels, carrying his majesty’s flag or jack, have presumed to approach too near before they did their duty by lowering their topsail; this is an insolence that our countrymen are sometimes guilty of: we have known them before the troubles fined smartly for daring to come too near the king’s ship before they struck;

(34) Here he speaks of respect to the flag from British subjects, as he did before as from foreigners. As to foreigners, it has sometimes been the cause of a war.

*Quæsitum est an tota classis ordinum exactis his eam reverentiam tenetur exhibere vel uni navi regis Anglici, quæcunque fuerit. Magnis animis ea de re actum & pugnatum est annis 1671 & 1672. Cum classis ordinum mense Augusto 1671, prope terram belgicam staret, Carolus II. in eam immisit navim quandam lusoriam, een jacht, tormentis tamen munitam. Mox navicula illa regia ab Archithalasso ordinum exegit secundum pacta prædicta reverentiam. Quam cum non præstaret, ejus navem tormentis petiit Anglica. Carolus, ordinibus jam infensus, ea occasione arrepta, iis bellum indixit; for, says he, the other assigned causes of the war were frigidissimæ.*

This I apprehend is the same event related above from Sir L. Jenkins. *Bynkershoek, Quæss. Juris Publici, lib. 2. ch. 21.* In another place he enquires whether yachts are vessels of war, and can demand salute.

As to our own countrymen, even of late years, prosecutions have not been unfrequent in the admiralty, for negligence in striking colours.

some two hundred pounds; nay, some five hundred pounds: you are to enquire of these men, that teach our neighbours to behave themselves unmannerly, and give them a pretence to deny an undoubted right of the crown.

“You are to enquire, if any have received and harboured traitors, felons, or outlawed persons, or enemies of the king, in the late wars, on board any ship or vessel at sea, or in any harbour or creek, or carried them over sea. If any during the late wars, have taken any prisoners of war, and afterwards discharged, or put them to ransom, without the king and the admiral’s knowledge. Or if any in the late wars have stopped any ships or vessels at sea, belonging to the subjects of his majesty, or his allies, and pillaged them, afterwards letting them go, this is piracy(35); or having taken such as were really prizes from the enemy, and have broken bulk, or embezzled them, or subducted the evidence or documents belonging to them, before they brought them to judgment, or else accepted composition for them, or carried them to foreign ports without bringing them to judgment.

(35) By statute 8 Geo. I. ch. 24. if any person belonging to any ship, upon meeting any merchant ship on the high seas, or in any port, haven, or creek, shall forcibly board and enter such ship, and though they do not seize and carry her off, shall throw overboard or destroy any of the goods, they shall be punished as pirates.

“You are to enquire if any ships, or mariners, being prest for the king’s service, have been withdrawn, or run away, or left it without a lawful discharge. Or if any of the king’s subjects, or the subjects of any of his allies, nay, if any of his enemies in the time of the late war, have been evil intreated by any persons, acting, or pretending to act, by the king’s commission(36), by beating torturing, or abusing them, contrary to the law of arms, and the permissions and usages of war ; or having any merchantmen in their charge or convoy, have not defended them in all dangers, as men of courage and fidelity ought to do, or have exacted any gratuities or rewards from them contrary to their instructions.

“You are to enquire, if any have bought prize goods of any foreign ships coming in this time of war from abroad into our ports, without their having special leave to sell(37), for their necessary victualling or repairs, to enable them to reach their own ports. The buying such goods, where there

(36) If under a foreign commission, it is piracy, by 11 and 12 William III. ch. 7.

(37) Whosoever shall take out of any prize any money, plate, or goods, unless it be *necessary* for the better securing thereof, or the *necessary* use of his majesty’s ships, before the same be adjudged lawful prize in the admiralty court, shall forfeit his share of the capture, and such further punishment as shall be imposed by a court martial, or by the court of admiralty. See eighth article of war in Statute 22 Geo. II. ch. 33 ; see also 13 Geo. II. ch. 4.

is no special permission to sell, being prejudicial to that neutrality which his majesty is pleased to observe and maintain towards the several parties now in war, and against several treaties now in force between his majesty and his neighbours.

“You are to enquire, if any have taken upon them to conduct ships or vessels as pilots, being not first approved of by the Trinity-house, and if any vessels came to miscarry, or to suffer loss through their negligence or want of skill, it was death without mercy by the ancient laws of the sea. It was death, likewise, if any did remove an anchor out of its place, without first giving notice to the ship it belonged to, if the death of any man, or the loss of the vessel ensued upon it.

“You are to enquire of all larcenies, that is, all fraudulent and injurious taking of other mens’ goods, without the knowledge of the owners, and in their absence. Where the thing stolen is above the value of twelve pence, it is death by the ancient customs of the admiralty; if under the value, it is but petty larceny.

“You are also to enquire of those that rob and pillage his majesty’s stores or provisions(38), out

(38) By the fourteenth article of war, any person in the fleet who shall run away with any of his majesty’s ships, or any ordinance, stores, ammunition, or provisions belonging thereto, shall suffer death; and by the twenty-fourth, any wasteful expence of ammunition, powder, shot, or other stores of the fleet, or any embezzlement thereof, is punishable in the offenders, abettors, buyers, or receivers, by a court martial, as it may think just.

of any of his ships or vessels, and of those that being intrusted with them, do embezzle or make them away at sea, or in foreign ports, fraudulently and falsely, contrary to the trust reposed in them.

“ You are to enquire of those who steal anchors and cables(39), long-boats, buoys, or buoy-ropes. He that anciently stole a buoy, or buoy-rope, though of never so little value, suffered death as a felon(40). And of those that maintain and use bum-boats, as they call them, upon the river; they are a great abuse, and, as I may call it now, become a public nuisance; for young people that are by their masters intrusted, are under a perpetual temptation to be cheated by those in the bum-boats, till at last they become cheats, thieves, and false to those that trust them.

“ But above all things you are to look to the honour and safety of your ports, that strangers and others may be as safe in their ships, as in so many castles, from thieves and robbers by night. And such was the care of our ancestors anciently for strangers, that if a foreign vessel, lying in

(39) It was so also for cutting a cable, if the death of a man was occasioned thereby; for otherwise they were only to make réparation in damages to the amount of the value of the ship. See the 40th and 41st articles of Magistri Rough-ton; see also statute 28 Hen. VIII.

(40) The mere stealing of anchors in port was punished by forty days imprisonment, article 43.

harbour or port, was robbed in the night, the admiral took six or seven of the most sufficient neighbours next to the place, and put them in ward till the thief was found out, and the foreigners had their goods restored to them, without being bound over to prosecute the thief, the admiral taking on him that care.

“You are to enquire of all mutinies, riots(41), fightings, bloodshed, maiming, cursing, swearing blaspheming, in any ship or vessel, within the flowing and reflowing of the waters, particu-

(41) The 1st of Geo. I. ch. 25. made perpetual by 9th of Geo. I. ch. 8. recites and punishes a species of riot frequent among seamen, &c. but as happening on land, not cognizable in the admiralty; I mean that of workmen in dock-yards, and sailors about the pay-office, on pay days.

As to mutinies, a very severe but temporary act was passed 37 Geo. III. ch. 70. in consequence of the mutiny at the Nore, and has been since annually continued to be in force until six weeks after the beginning of the subsequent session of parliament. By this act to seduce persons serving in his majesty's forces by sea or land from their allegiance, or to make, or endeavour to make, a mutinous assembly, or to *commit any traitorous or mutinous practice whatsoever*, is punished with death; and though done on the high seas, the offence may be tried before any court of gaol delivery or oyer and terminer in any county in England. Surely the passage marked with italics is too vague; but it is a temporary act.

Quarrelling and reproachful words in his majesty's navy, are, by the 23d article of war, punishable by a court martial at their discretion.

larly of such mariners as have assaulted their masters, being disobedient and rebellious against their lawful commanders; as also of such masters as treat their mariners inhumanly, and do not pay them the wages they have honestly earned.

“Lastly, there are several rights and emoluments belonging to the ancient office of high admiral of England, that are at this time, by surrender of his royal highness, returned to and vested in the crown, and it has always been the course of this court to give them in charge.

“You are to enquire, therefore, of those that have seized and taken to themselves wrecks at sea, having neither grant nor prescription whereby they may lawfully do it; of those that have possessed themselves of flotsons, jetsons, lagon, derelicts, deodans, treasure-trouve, the lord admiral’s tenths in men of war, royal fishes, such as whales, sturgeons, porpoises, shares in the casualties, and ejectmenta maris, the goods of pirates, the goods of enemies in the late wars, the goods of traitors, felons, out-laws, felones de se, when lying within the jurisdiction of the admiralty; or of any other rights or perquisites belonging to that office.

“You are to enquire of those that have broken the arrests, or refused to be assistant to the officers of the admiralty, in executing the warrants and attachment of the court; of such as in contempt of the jurisdiction of the admiralty have sued and impleaded others in Guildhall or other courts,

touching matters arising within the jurisdiction, and of right belonging to the cognizance of his majesty's court of admiralty."

Such, and so extensive is the chart drawn by Sir L. Jenkins, of the criminal jurisdiction of the admiralty in his time. But, since that period, many of the matters above mentioned have ceased, from disuse, to be examined into or punished by this court, and many more have been subducted from its authority by act of parliament, expressly or impliedly. The naval articles of war, established by act of parliament(42), have, in their effect taken away numerous subjects of jurisdiction, and extend to all the offences therein mentioned, though committed in places within the admiralty jurisdiction, or rather are to such places expressly confined. The offences of cowardice, of desertion, of mutiny, of disobedience of orders, of quarrelling, of waste, of embezzlement, are now on board his majesty's ships of war, triable by courts martial, and though the statute(43) preserves a concurrent jurisdiction to the court of admiralty, it is seldom resorted to.

The chief privilege preserved to the lord high admiral, or the lords commissioners of the admiralty, seems to be that of granting the commissions which empower naval commanders to assemble courts martial; and with respect to the *marine* forces, they have been empowered to form their articles of war.

(42) See 22 Geo. II. ch. 33.

(43) Sec. 25.

Some smaller privileges are also expressly reserved to this court, or rather to the instance, such as condemning to make reparation for not protecting ships under convoy.

By the prize acts, commanders of privateers taking ransom for captured ships, are punishable by fine and imprisonment in this court.

If there be any doubt of the authority of the court martial, the power reverts to the court of admiralty, and perhaps is always concurrent in it though disused, for the acts authorizing courts martial, expressly take care that the old jurisdiction of the-admiralty shall not be infringed.

Thus in a case mentioned by Jenkins of a pilot, by whose ignorance a king's ship had been lost, he gives his opinion, that if he could not be reached by a court martial, he was punishable *criminaliter* by the admiralty court.

By the prize act, the offences therein mentioned, though committed out of the realm, may be alledged to be committed in any county in England.

By the same act, sessions of admiralty must be held twice a year at the Old Bailey, and may be held wherever the lords of the admiralty may appoint.

In all the provisions relative to this criminal court of admiralty, the jurisdiction of the cinque ports is preserved. Thus in the 28th of Henry VIII. it is enacted, that when any such commission, as therein the king is empowered to grant,

shall be directed to any place within the jurisdiction of the cinque ports, such commission shall be directed to the lord warden of the ports, or his deputy, and three or four such persons as the lord chancellor shall name; the inquisition and trial to be had by the inhabitants in the cinque ports, and the members of the same.

The same provision is made in the 11th and 12th of William, as to the offences punished by that statute.

## CHAPTER XII.

## OF VICE-ADMIRALTY COURTS.

ALL the powers of vice-admiralty within his majesty's dominions are derived from the high admiral, or the commissioners of the admiralty of England, as inherent and incident to that office. Accordingly, by virtue of their commission, the lords of the admiralty are authorized to erect courts of vice-admiralty in North America, the West Indies, and the settlements of the East India company(1).

So in Great Britain also, the lord high admiral doth (by virtue of his place) appoint in divers parts of the kingdom his several substitutes or vice-admirals, with their judges and marshals, under the great seal of the high court of admiralty, which vice-admirals and judges do exercise jurisdiction in maritime affairs, within their several limits, and in case any person be

(1) If there had been any doubt of this, it was settled by the opinion of great and able civilians, in the case of the *Sarragossa*, in 1786.

aggrieved by any sentence, or interlocutory decree, having the force of a definitive sentence, (which it has if no other sentence is to be expected in that cause) he may appeal to the high court of admiralty(2).

The court of admiralty in Ireland is not a vice-admiralty court. For its present nature and construction I must refer to the Irish act of 1782; and a clause in the act of union, both given in the appendix.

Vice-admirals are removable at pleasure, notwithstanding the statute 12 and 13 Edward III. ch. 2. sec. 3.

The court of admiralty in Scotland is sometimes called a vice-admiralty court. I am not sufficiently acquainted with its construction to pronounce thereupon. The appeal, I understand, lies to the lords of session, from thence to the house of lords; but not having been able, after consulting many books on Scotch law, to get a clear account of it, I speak with hesitation.

The vice-admiralty courts which chiefly claim our attention, are those in America and the West Indies.

These courts, by the provisions of 12th of Charles II. commonly called the Navigation Act, and 7 and 8 of William III. ch. 22. obtained in a singular manner a jurisdiction in revenue causes, totally foreign to the original jurisdiction of the

(2) See statute 8 Elizabeth, ch. 5.

admiralty, and unknown to it; and yet, as an appeal lies from these courts, in all but prize causes, to the admiralty of England, the latter thus entertains revenue causes(3) by appeal from the West Indies, which it could not entertain originally.

These courts, being from their remoteness, and the liability of minor judges in the plantations to influence, if not to corruption, subject to much abuse, it became necessary to control their jurisdiction with a strong hand; and accordingly, by the prize acts, their fees were limited, and their delays punished(4).

These provisions proving ineffectual, in the last session of parliament(5) an act was made by which the prize commissions of vice-admiralty courts in the West Indies having been previously

(3) The case of the ship *Columbia*, in 1782, is a memorable instance. In that case Sir James Marriott says, the court of admiralty derives no jurisdiction in causes of revenue (appropriated by the common law to the court of exchequer) from the patent of its judge, or the ancient jurisdiction of the crown in the person of its lord high admiral. The first statute which places judgment of revenue in the plantations with the courts of admiralty, is the 12th Charles II.

(4) See 29 Geo. II. ch. 34. and other acts, by which their delays made them subject to a forfeiture of five hundred pounds, half to the king, half to the informer; and their fees were limited to ten pounds in judgment on prizes under one hundred tons; if over, to fifteen pounds.

(5) 41 Geo. III. ch. 9.

revoked, the king is enabled to make competent provision for the judges of three vice-admiralty courts, two of them in any two of the islands in the West Indies, and the other at Halifax; their salaries not to exceed two thousand pounds, nor their fees and profits as much more; and his majesty is empowered to establish rules and regulations for the said courts, and to alter and amend such rules.

These courts are enabled by this act to exercise jurisdiction over all prizes carried into any of his majesty's colonies in the West Indies, as if brought into any port of the island or colony where the courts are held; and they may issue commissions for examination of witnesses, of appraisement and sale, or for any other purpose of legal adjudication, into any part of his majesty's territories or colonies in the West Indies or America.

The king may also issue a commission of prize, whenever he may please, to any other vice-admiralty court in the West Indies, to be subject to the same regulations.

From these courts, as from instance and revenue courts, appeals lie to the high court of admiralty in England; and, says Judge Blackstone, *also* to the king in council(6). But this opinion of his seems to be relinquished(7). From them, as prize

(6) Comm. 3 vol. ch. 5.

(7) See 2d Robinson, p. 248, and the note there marked a. The power of the high court of admiralty to receive appeals from the vice-admiralty courts in revenue causes,

courts, the appeal lies to certain lords commissioners of appeal, consisting chiefly of members of the privy council.

As to the appeals from these courts in prize causes, several new regulations are adopted by the above mentioned act of 41 Geo. III. which must be here enumerated.

The act provides, that if in such causes the claimants decline to take the property on bail, in the manner described above in the tenth chapter, the court, with consent of captors and claimants, may direct it be sent to England for sale; and if the captors unreasonably withhold their consent, they shall pay the difference of the value at the time of restoration, and of the produce if it had been sent to England.

The like rule takes place in case of appeal, if request be made by appellants. Proceeds, if the property be sold already, to be lodged in the bank. If any difficulty occurs, either party may apply to the high court of admiralty, or lords commissioners of appeal.

The same statute, after reciting that great inconveniences had arisen from delays in serving the processes of courts of appeal for obtaining appearances, &c. it *enacts*, that in all cases of cap-

had been disputed on the ground that they were not in their nature causes civil or maritime, but that it was a jurisdiction specially given to the vice-admiralty courts by 7 and 8 Wm. III. ch. 22. which took no notice of any appellate jurisdiction in the high court of admiralty in such cases; but this point was fully settled in favour of this jurisdiction in 1754.

ture by his majesty's ships, service on his majesty's proctor shall be deemed effectual service upon the captain of a king's ship; and when the court grants a letter of marque, the owner shall appoint a proctor, and service upon him shall be deemed service on the commander, in all cases when an appeal has been lodged within fourteen days. If in another court, they are to have a registered proctor, and the names of the owners to be registered. Owners and their sureties are parties to all and every part of the proceedings after final sentence, without further process of contempt.

The act further saith, that if no appeal be entered, service of the process upon the commander of kings' ships, or his registered agent, or his majesty's law officers in the court below, or upon the commander of privateers, owners, or either of the sureties, shall be sufficient service on the parties.

## CHAPTER XIII.



## OF THE CINQUE PORTS.

THE ports of the county of Kent being particularly liable to invasion, and in some respects the key of the kingdom, were always considered by our monarchs as stations of the utmost importance, and the inhabitants of some of them(1) honoured with peculiar privileges, liberties, and franchises, first by William the Conqueror (who originally created a lord warden of the Cinque Ports) and afterwards by king John, on condition of their providing a certain number of ships at their own charge for forty days. These privileges, however, though increased by these monarchs, did not originate with them; they are claimed in part by prescription, and in part by act of parliament

(1) Particularly of *five* of the most important, Dover, Sandwich, Romney, Hastings, and Hythe, to which were afterwards added, Winchelsea and Rye. The men of Kent, from their exposed situation, were always peculiarly celebrated for courage.

and charter, and have been time out of mind(2). With these franchises, and the peculiar courts and jurisdictions of the Cinque Ports, we have nothing to do, save as the jurisdiction of admiral exists within these ports, exempt from the admiralty of England, which exempt jurisdiction is admitted(3).

This exemption, acknowledged by Lord Coke, is recognized in various acts of parliament. Thus the statutes 2 Henry V. and 28 Henry VIII. ch. 15. directing the proceedings of the lord high admiral of England, in cases of treason and felony, reserve the cognizance of such causes in the Cinque Ports to its own admiral jurisdiction, distinct from, and independent of the lord high admiral's jurisdiction.

So by 11 and 12 of William III. ch. 7, it is enacted, that when any commission for the trial and punishment of the offences in that act mentioned, shall' be directed to any place within the jurisdiction of the Cinque Ports, such commission shall be directed to the lord warden, or his lieutenant, and such other persons as the lord high chancellor shall name; and every inquisition and trial to be had by virtue of such commission, shall

(2) 4 Ins. 223. In the time of Edward the Confessor, there were three of these favoured ports, Dover, Sandwich, and Romney.

(3) 2 Ins. 556. 4 Ins. 223. 2 Jones, 67. Sir L. Jenkins, 1 vol. 85.

be by the inhabitants of the Cinque Ports, or the members of the same.

And so, by 7 Geo. I. continued by 18 Geo. III. ch. 45. the lord warden of the Cinque Ports is to make rules and orders for the government of pilots within his jurisdiction, and in *many* other general acts, exceptions are provided to save unimpeached the franchises of the Cinque Ports.

I shall next briefly consider how far the admiralty court of the Cinque Ports is exempt from the authority of the admiral of England, as an instance, a criminal, or a prize court.

As an instance court, no question can arise except as to the court of appeal from its decisions. It has indubitably a right to determine all causes, civil and maritime, arising within the Cinque Ports(4); but whether the appeal lay to the lord warden of the Cinque Ports, or to the judge of the high court of admiralty of England, has been a question strongly litigated; for the arguments on both sides of which question, the reader must be referred to the remarkable case of(5).

(4) What are the limits of the Cinque Ports has therefore often been a question. Whether they are confined to the harbours, or extended to the *Downs* and other places. On these limits I am not ashamed to say I am uninformed, since I have seen late opinions of great English civilians making the same acknowledgment.

(5) 2 Jones, p. 67.

Civil droits come within the province of the instance court ; but if a vessel of the Cinque Ports finds a derelict at sea, without the limits of those harbours, it is a droit of admiralty, and the subsequent bringing of it into those harbours doth not oust the ordinary admiralty jurisdiction of England(6).

In the same manner, if a prize be taken at sea by a non-commissioned vessel of the Cinque Ports, there is no doubt that it is a droit of the admiralty of England ; but great disputes have arisen whether if taken within the Cinque Ports, they are droits of the admiralty, or of the lord warden.

This leads to the general question, whether the lord warden of the Cinque Ports, or his deputy, has any *prize* jurisdiction ?

On this head I can only say, that I have seen an opinion of an eminent civilian(7), confirmed in substance by that of another(8) still more eminent, both given in 1781, that the lord warden's right to *prize* droits (and therefore I think it must follow to prize jurisdiction in general) was fully established by ancient and immemorial usage, and conveyed to him by the general terms of his

(6) This appears, from opinions given to the lords of the admiralty, on cases by them referred, as to certain Dutch wrecks found at sea, by vessels of the Cinque Ports, in 1763, which the author has seen.

(7) Dr. Bever.

(8) Sir William Wynne.

patent. But on the other hand, in the famous case of the *Oester Eems*, 1783, it should seem that one of the great civilians(9) above alluded to, had changed his opinion, for he did, in concurrence with three other eminent counsel, give his opinion upon that occasion(10), that if the said ship was to be considered as a *droit of admiralty*, it did not pass to the lord warden(11) by his grant, *there being no mention therein of prizes and captures, either by sea or land, within the jurisdiction of the Cinque Ports.*

As to crimes committed within the bounds of the Cinque Ports, the lord warden of the Cinque Ports has a jurisdiction exclusive of the admiralty of Great Britain; but as in the latter court criminal proceedings, under its primitive jurisdiction, have entirely given way to those under the statute of the 28th of Henry VIII.(12) so they may be

(9) Sir William Wynne.

(10) This opinion was subscribed with the names of three others, viz.

R. P. Arden.

W. Scott.

F. C. Cust.

(11) Then Lord North.

(12) See ante chapter the eleventh. There are several cases in Croke's Reports relative to the Cinque Ports worthy of notice, in which it was determined, amongst other matters, that prerogative writs, such as *habeas corpus*, *mandamus*, &c. run there; that an appeal lies in the king's bench for a murder in the Cinque Ports; and that a *certiorari* lies to remove an indictment for felony in the Cinque

presumed to do in the one first mentioned, that of the Cinque Ports.

It must be observed, that the courts within the Cinque Ports are various; a court before the mayor and jurists of each port; a court before the constable of the castle of Dover; and a court of the Cinque Ports, *apud Shepway*; and much confusion has arisen from not distinguishing between these courts(13).

Where a vessel has been taken prize within the verge of the Cinque Ports(14), and the cognizance Ports. See Cro. Car. 247, 253, 264. In the year 1751, a robbery having been committed on board a sloop of war in the port of Dover, the following opinion was given by a counsel of eminence:

"If the robbery was committed within the bounds of the Cinque Ports, the lord warden has jurisdiction exclusive of the admiralty of England; and in such case, the lords of the admiralty cannot direct a court martial.

"If the place where the fact was committed be within any county, the prosecution will be most proper at the assize of that county. If not within any county, the trial may be before the lord warden and his assistants, or by a special commission of oyer and terminer, under the statute of Henry VIII."

(13) Thus Cro. Car. 252, 264. The mayor and jurats of one of these ports, though an indictment was taken before them as justices of peace, erroneously supposed that a certiorari to remove it was to be directed to the lord warden.

N. B. It is said, Cro. Car. that the Cinque Ports, though a liberty created by act of parliament, always remain parcel of the county

(14) It is evident that the lord warden could never pretend even to any cognizance of prize taken at sea, and merely brought into the Cinque Ports.

of its adjudication claimed by the lord warden, it has not been unusual for the captor, notwithstanding, to return the papers into the admiralty of England, and for the claimant from thence to issue a monition to proceed to adjudication, (and then the cause attaches there) to which monition the lord warden has sometimes appeared to claim his alledged privileges, as in the case of the *Oester Eems*, but without success.

In the letters of Sir L. Jenkins, we find a commission of review granted by the lord warden of the Cinque Ports, of a sentence given by the admirals thereof, and his opinion that this could not be reversed by the crown, though it might by a court of *Sheppey*.

## CHAPTER XIV.

## OF CONSULS.

WHEN trade and commerce began to flourish in modern Europe, and controversy thence to spring, reason dictated to merchants and mariners the desire of a court formed of men acquainted with trade and maritime affairs. Permission to erect such tribunals was soon obtained from various princes; and vanity, perhaps, inspired the idea of giving to these minor judges the magnificent appellation of consuls(1).

The institution is a kind of court-merchant, to determine affairs relative to commerce in a summary way. Their authority depends very much on their commission, and on the words of the *treaty*, or the extent of the *permission* on which it

(1) I must refer the reader for the origin, nature, and power of the office of consuls, as first established, particularly in Spain, to the *Consolato del Mare*, which begins with a large discussion of the subject from which it takes its name.

is 'founded. In France and Spain the office is viewed in a twofold light, domestic and foreign: in England only in the latter, we having no consular establishment *within* the united kingdom of Great Britain and Ireland to settle disputes between our own traders(2).

The first jurisdiction of consuls in France was that of Tholouse in 1519.

Acts made in foreign countries are not valid in France, unless made legal by the consul. Their consuls abroad have a chancery(3) and registry. They are to authenticate instruments, to take inventories of the goods of their countrymen who die abroad, and of effects saved from shipwreck; and they are a criminal court, without appeal, with respect to offences among their compatriots, not inducing corporeal penalty, which if they do, the consuls are to send the criminals home to be tried by the laws of their country(4).

Our English consuls are to take care of the affairs of our trade, and of the interests, rights, and pri-

(2) The want of such a tribunal has occasioned the merchants in many sea-ports to form a kind of domestic judicature, or society of arbitrators, by consent amongst themselves, to decide mercantile disputes.

(3) We have heard too much of the *chanceries* of the French consuls in Norway, in Sweden, taking upon them to condemn prizes in the late war.

(4) I apprehend, however, for enormous crimes, as murder, the legislature of the country where the fact happened, would scarcely leave this liberty to the consul.

vileges of our merchants and seamen in foreign countries.

Their authority will be best illustrated by reference to the various acts of parliament relative to their duties (5), and by the cases inserted in the Appendix for the purpose of its further illustration. Even where they have express authority, it is the constant practice, and most useful resource of all commercial strangers and mariners, to apply in matters of any difficulty or embarrassment to the consul of their nation for advice and assistance; and he is the natural arbitrator of all their disputes.

To sum up briefly the points most material to be known as to *consuls*—they are, that their powers may be founded in treaty or in permission, and that the powers of the former are generally

(5) To enumerate all these would be too long a task. One or two may serve by way of example. By 8 Geo. I. ch. 17. the consuls in Portugal may call a general meeting of merchants and factors, and may, with the consent of a majority, levy certain sums from all ships trading there, for the relief of shipwrecked mariners and other charitable purposes. By 9 Geo. II. ch. 25. and 10 Geo. II. ch. 14. the like power is given to consuls in Spain and at Leghorn. By other statutes he is to relieve all distressed British seamen and merchants, to allow them sixpence a day for their support, to send them home in the first British vessels that sail, and to give free passes to all poor British subjects returning home. But for further particulars of a British consul's privileges and duties, I must refer the reader to this head in *Beawee's Lex Mercatoria*.

greater, and always less disputable; and to know with precision what powers are claimed by any particular consul, his commission must in the first instance be referred to. That a consul is not a public minister, but in general a person conversant and employed in trade, and liable to the *lex loci* both civil and criminal, and therefore I conceive not exempt from arrests even in civil suits. That his privileges, such as exemptions from certain taxes or burthens, depend in each place, if not on treaty, upon custom. That they are not with us elected, as of old, by the merchants, but appointed by the secretaries of state. And that their proper business is to protect and assist the persons and trade of their own countrymen abroad; settle, if possible, disputes or controversies between them; and, if necessary, convey their complaints to the government of the place.

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## CONCLUSION.

THE plan of this work being now executed, which, however confined in its compass, purports at least to be original in its design and plan as an admiralty treatise; and to guide the reader to those springs in which he may gratify his thirst for

knowledge on points it has not room to resolve, one question, perhaps, may with some remain unsatisfied, viz. Why is the law of the admiralty thus connected, blended with, and adjoined to a treatise on the civil law? If it be possible that a careful peruser of this work should, after reading it, put such a query, and insist on the brevity of discussion in the Roman code of all subjects relative to maritime affairs, I answer him thus: Let it be first considered, whether the marine laws of Rome, though short and concise, have not been our great and principal guides on some most important subjects.—On the nature and effects of the contracts of masters and mariners—on average and contribution—on questions relative to the collision of ships—on the law as to shipwrecks—on hypothecations—on nautical interest—all our *principles* are derived from them. As to *practice*, how can the practice of the admiralty court be intelligible without knowing the practice of the civil law? *The court of admiralty*, says the great Lord Hardwicke, if any authority was wanted, *always proceeds according to the rules of the civil law, except in cases omitted*(6). But this is a mode of addressing those only whose ideas upon the subject are gross or vague. The profound civilian knows that the *maxims* of the Roman law are founded in general wisdom, and applicable to every subject. The general rules, that *prima facie* at least ne-

(6) See 1 Atkyns, 295.

*minem alterius contractu obligari debere*; that *pacta contra leges*, and *bonos mores non valere*; that *qui facta suorum hominum præstare debet, præstare debet ex asse*, and the like, are either *universally* or *generally* received through the civilized world.

But this is not all. Great civilians, who first extracted the principles of modern naval laws from the treasures of the Roman code, did not find them there under the same denomination. They did not look into the Rhodian law, to determine whether ships recaptured should be restored on salvage to their former owners, but to the rules as to *Jus Postliminii*, mostly given under the head of *Paternal Power*. They did not find the doctrine of droits, in the law *De Naufragiis*, but in that *De Jure Fisci*. They traced the limits of *contraband*, and the question whether the innocent mariner shall be paid his freight, though the contraband cargo of the freighter be seized, not in any naval code, but in the general laws of exportation, and of mortgages or pledges, *Quæ res exportari non debeant*, and *Si pignus publicetur, tamen jus pignoris non extinguitur*. Instances might be multiplied without number(7); but these may suffice to shew, that it is not merely to the *subjects* we are to look, but to the *principles*

(7) Such as the application of the laws *De Pauperie*, and *De Incendio*, to the collision of ships; *De Tabernis*, and *Institoribus*, to the effects of the torts of masters of ships upon owners, &c. &c.

of the *decision*, and the *reasons* on which it is founded. Where these reasons appear to extend to things in general, and to be applicable to naval affairs as well as others, they have been by able and ingenious men successfully so applied.

In the commencement of the work, the observation of the celebrated Bynkershoek was mentioned, that *in iis quæ sola ratio commendat, a jure Romano ad jus gentium tuta fit collectio*; and that of the first of the civilians of these days, that *great part of the law of nations is founded on the civil law*—I shall conclude with the emphatic exclamation of the foreign jurist, speaking of this illustrious code, *Ubi parem prudentiam invenire est?*



## APPENDIX.

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No. I.

FROM THE PETERSBURGH COURT GAZETTE\*.

*Copy of the Convention with the Court of London, signed at  
Petersburgh, June 17, 1801.*

### IN THE NAME OF THE MOST HOLY AND INDIVISIBLE TRINITY.

THE reciprocal desire of his majesty the emperor of all the Russias, and of his majesty the king of the united kingdom of Great Britain and Ireland, being not only to come to a good understanding relative to the disputes, which, on a late occasion, interrupted the harmony and the relations of friendship which subsisted between the two states, but also to prevent, for the future, by candid and unequivocal explanations with regard to the navigation of their respective subjects, the recurrence of similar altercations, and of the unpleasant circumstances which might ensue; and the object of their said majesties' solicitude being to bring about, as soon as can be conveniently done, an equitable adjustment of such disputes, and invariably to settle their principles on the rights of neutrality, as applicable to the respective monarchies, in

\* The Russian treaty is inserted in the Appendix, because it so clearly illustrates the seventh chapter on Prize Law.

order to be united in closer bonds of friendship, of which they acknowledge the utility and the advantages, have appointed for their respective plenipotentiaries, namely, Count Panin, &c. and Alleyne Lord St. Helens, &c.

Art. I. There shall be henceforward between his Imperial Majesty of all the Russias, and his Britannic Majesty, their subjects, states, and countries, a solid and a lasting friendship; all the political and other relations of commerce, advantageous to their respective subjects, shall exist as heretofore, without being liable in any manner to be disturbed or interrupted.

II. His Majesty the Emperor and his Britannic Majesty declare it to be their will most rigorously to enforce due obedience to the articles which relate to the contraband trade of their subjects with the enemies of either of the high contracting parties.

III. His Imperial Majesty of all the Russias and his Britannic Majesty having resolved to place the freedom of commerce and of navigation under a sufficient safeguard, in case that one of them should be at war while the other remained neuter, have agreed as follows:—

1st. That the ships of the neutral power may freely sail to the ports and coasts of the belligerent nations.

2d. That the goods put on board the neutral ships shall be free, excepting at all times warlike stores and property of the enemy: and it is agreed upon not to include among the latter the merchandise which should prove to be the produce, the growth or manufacture of the country at war, purchased by the neutral power and for its use; which merchandise, in no case whatever, shall be excepted from the liberty granted to the flag of the said power.

3dly. That to avoid all ambiguity with regard to what is to be considered as warlike stores, the contracting sovereigns declare, agreeably to the XIth article of the commercial treaty, concluded between the two crowns on the 21st of

February, 1797, that they only consider the following objects as such, viz. cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, muskets, flints, matches, powder, saltpetre, sulphur, cuirasses, pikes, swords, belts, pouches, saddles, bridles, excepting, however, what of the above may be necessary for the defence of the ship and the crew, and all the other articles not mentioned herein, shall not be reputed warlike or naval stores, nor subject to confiscation, and consequently shall pass unmolested and untouched, unless they prove to be the enemy's property.

It is also agreed upon, that what is stipulated in the present article shall not infringe on the particular stipulations of either crown with other powers, by which objects of that nature would be prohibited or not.

4thly. That in order to determine what characterizes a blockaded port, that denomination shall be only applied to the port in which, according to the disposition of the power which attacks it, with ships stationed near it, there shall be evident danger of entering.

5thly. That the vessels of the neutral powers shall not be stopped but on just grounds, and in consequence of evident facts: that their fate shall be immediately decided upon, and the process be always uniform, speedy, and agreeably to law.

The better to enforce the respect due to these stipulations, dictated by the sincere desire of conciliating the reciprocity of interests, and to give a fresh instance of their good faith and their regard for justice, the high contracting parties here most formally engage to renew the most severe prohibitions both to their officers commanding ships of war, and to masters of trading vessels, against having on board any of the objects which, according to the tenor of the present convention, may be considered as contraband.

IV. The two high contracting parties, willing still further to prevent, for the future, every subject of discussion, by circumscribing the right of visiting merchantmen sailing

without convoy, only in case that the belligerent power might experience a real injury by the abuse of the neutral flag, have agreed,

1st. That the right of visiting merchant ships belonging to the subjects of one of the contracting powers, and sailing under convoy of a ship of war of the said power, shall not be resorted to but by the ships of war of the belligerent party, and shall never extend to private ships, to privateers, nor other vessels not belonging to the imperial or royal fleet of their majesties, but armed for war by their subjects.

2dly. That the owners of all the merchant ships belonging to the subjects of one of the contracting sovereigns, destined to sail under convoy of a ship of war, shall, before they receive their final instructions for sailing, exhibit to the commanding officer of the ship of war their passports, certificates, or letters of service.

3dly. That when such ship of war, having merchantmen under its convoy, shall be met by a ship or ships of war of the other contracting party then at war, in order to avoid all confusion, they shall respectively stand out of the range of cannon shot, unless the state of the sea, or of the place where the meeting takes place, shall require them to approach; and the commanding officer of the ship of the belligerent power shall send a boat on board the convoying ship of war, where the papers and certificates shall be reciprocally verified; and prove that the neutral ship of war is authorized to take under its protecting care such and such merchantmen of his nation, having such a cargo on board, and bound for such a port; on the other hand, that the ship of war of the belligerent power belongs to the fleet of their imperial or royal majesties.

4thly. After such verification, no further visit shall take place, if the papers be found in due form; should the contrary, however, prove to be the case, the commanding officer of the neutral ship of war (being so required by the com-

manding officer of the power at war) must bring to, in order that the merchantmen may undergo a search, which shall take place in his presence on board each ship.

5thly. If it happen that the commanding officer of the ship belonging to the power at war, having examined the papers on board, and having questioned the master and the crew, shall find just and sufficient reasons to detain the merchantmen, for the purpose of making a further search, he shall signify to the other officer that such is his intention: the vessel shall then be carried into the next port for the purpose above-mentioned.

V. It is also agreed upon, that if any merchant ship, thus under convoy, be detained without just and sufficient cause, the commanding officer of the ship belonging to the state at war, shall not only be held fully responsible to the owners of the vessel and cargo for the loss sustained by them in consequence of such detention, but that he shall also be answerable for any act of violence, &c. offered on the occasion; on the other hand, the vessel to be searched, must, on no possible account, oppose resistance to the will of the sovereign's officer.

VI. The high contracting parties shall give precise and unequivocal orders that the sentence pronounced on prizes thus made, be agreeable to the rules of the most rigorous justice and equity, that they be delivered by faithful judges, uninterested in the transaction; the government of the respective states shall take care that such sentences be duly and promptly executed, according to the forms prescribed.

When vessels are detained without just cause, or the stipulations violated, the owners shall be indemnified in proportion to the injury they may have suffered.

VII. In order to obviate all the inconveniencies likely to result from want of good faith in those who sail under the flag of a nation to which they do not belong, it is settled definitively that a vessel, in order to be considered of the na-

tion under the flag of which she sails, must have the captain and half her crew of that country, and all her papers and passports in due form; and that all vessels not acting agreeably to the above regulations, shall be exempted from the rights and protection of the said flag.

VIII. The principles and measures adopted by the present act shall be likewise applicable to all maritime wars in which either of the two powers may be engaged, while one of them stands on neutral ground; such stipulations are to be considered as permanent, and shall be the criterion of the contracting powers, in all that regards trade and navigation.

IX. His majesty the king of Denmark, and his majesty the king of Sweden, shall be immediately invited by his Imperial Majesty, in the name of the two contracting parties, to accede to the present convention, and at the same time to renew and confirm their respective treaties of commerce with his Britannic Majesty; and his aforesaid majesty engages by the means of the acts which shall corroborate this agreement, to restore to both these powers all the prizes taken from them, as well as the territories captured by the arms of his Britannic Majesty since the commencement of hostilities, in the state they were in when captured.

X. The present convention shall be ratified by the two contracting parties, and the ratifications exchanged at St. Petersburg, within the space of two months at farthest, reckoning from the day of the signature.

In faith of which the respective plenipotentiaries have caused duplicates of it to be drawn out, perfectly alike, signed by them, and stamped by their arms.

Given at St. Petersburg, the 17th of June (5th) 1801.

(L. S.)

N. COMTE DE PANIN.

(L. S.)

ST. HELENS.

## No. II.

*Extract from the Irish Act 1782.*

WHEREAS it is expedient to regulate the high court of admiralty in this kingdom, and the mode of appealing therefrom: Be it enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that his majesty, his heirs and successors, shall and may from time to time nominate, constitute and appoint, under the great seal of this kingdom, one fit and discreet person to be judge of the high court of admiralty in this kingdom, to have and hold said office so long as he shall behave himself well therein; and that the person so to be nominated, constituted and appointed, shall have full power and authority to hear and determine all, and all manner of civil, maritime and other causes to the jurisdiction of the said court belonging, or which of right belong thereto, according to the laws and statutes of this realm.

Provided always, that it shall and may be lawful to and for his majesty, his heirs and successors, to remove such judge, upon the address of both houses of parliament, any thing herein to the contrary thereof in any wise notwithstanding.

And be it further enacted, by the authority aforesaid, that it shall and may be lawful for any person or persons, who shall be aggrieved by any sentence, order, or adjudication of the said court, to appeal to the king, or to his lieutenant, or other chief governor or governors of this kingdom, in the high court of chancery in this kingdom, and that upon every such appeal, the chancellor, keeper or keepers of the great seal, shall grant a commission or delegacy to some discreet and well learned persons of this kingdom, un-

der the great seal thereof, which commissioners or delegates, so to be appointed, and none others, shall have full power and authority finally to hear and determine all causes and grievances contained in such appeals, as well in the principal matter as all circumstances and dependants thereon.

*Extract from the Act of Union between England and Ireland,  
40 George III.*

It is enacted, that it be the *eighth* article of union, that all laws in force at the time of the union, and all the courts of civil and ecclesiastical jurisdiction within the respective kingdoms, shall remain as now by law established within the same, subject only to such alterations and regulations from time to time as circumstances may appear to the parliament of the united kingdom to require. Provided, that all writs of error and appeals depending at the time of the union, or hereafter to be brought, and which might now be finally decided by the house of lords of either kingdom, shall from and after the union be finally decided by the house of lords of the united kingdom. And provided, that from and after the union there shall remain in Ireland an instance court of admiralty, for the determination of causes, civil and maritime only, and that the appeal from sentences of the said court shall be to his majesty's delegates in his court of chancery, in that part of the united kingdom called Ireland; and that all laws at present in force in either kingdom, which shall be contrary to any of the provisions which may be enacted by any act for carrying these articles into effect, be from and after the union repealed.

## No. III.

*Extracts from Opinions relative to the Power of the Admiralty to try Misdemeanors.*

THE *Espiegle* sloop of war having, in 1796, sent a boat to seize a smuggler, several shots were fired at the boat by the crew of the smuggler. The persons who fired were put into confinement.

With respect to the persons under confinement, we think it extremely doubtful, whether any criminal proceedings could be instituted against them under the statute of Hen. VIII. no proceedings of that nature against persons charged with *misdemeanors* appearing to have been instituted with effect for the last hundred years. Though we are aware of great difficulties attending a resort to the common law jurisdiction of the admiralty, arising from its having gone into great disuse, we think upon the whole it is fit to be attempted in this case. If on a full affidavit of the facts, the judge decline to issue his warrant against the persons, it may be matter of proper consideration, whether an indictment against them for a *confederacy* should not be preferred under the admiralty commission usually sitting at the Old Bailey.

W. SCOTT.

J. SCOTT.

W. BATTINE.

In 1796, the *Unicorn* frigate having taken a smuggler, the sailors put on board her from the frigate were assaulted and beaten by the smugglers.

This offence is only a misdemeanor, and I am not aware of any instance of a prosecution for a misdemeanor under the statute of 28 Hen. VIII. ch. 15. That statute gives no jurisdiction over misdemeanors in general, but confines it to treasons, felonies, robberies, murders, and *confede-*

*racies*. It may be a point worth trying, whether this offence may not come under *confederacies*\*; if the case be not comprehended under the statute, it seems punishable, without a new law, for I believe the criminal jurisdiction of the admiralty, except as exercised under the above statute, is obsolete.

#### SPENCER PERCIVAL.

Though indictments were anciently preferred for confederacies where no capital offence had been committed, yet for a century, or thereabouts, no such proceeding has been had under the commission at the Old Bailey. There seems to be some difficulty also in ascertaining, whether the proceedings in the ancient cases were under such part of the commission as was founded on the statute, or such part as was founded in the original jurisdiction of the admiralty; and it appeared to me that if the proceeding was to be upon the latter, it was understood to be materially different (if the nature of it at this day can be accurately ascertained) from the proceedings to be had under the statute. If I recollect rightly, Sir George Paul, and the other law officers of his time, felt the difficulty of proceeding under the statute so much, as to advise, in case of misdemeanors, the proceeding in the admiralty court acting upon its original primitive jurisdiction, though I do not recollect that misdemeanors, except some few of a particular class, have been so prosecuted, notwithstanding the difficulty of prosecuting misdemeanors committed at sea has been felt as a grievance. J. SCOTT.

Two sailors had, in the year 1798, behaved mutinously and insolently on board a vessel whose letters of marque were irregular and void.

We are of opinion, that these sailors are not amenable to a court martial; and their offence being simply that of a *misdemeanor* committed *at sea*, we are of opinion that they can-

\* The objection to this depends upon a quere, whether the word means only such confederacies and conspiracies as have for their object the perpetration of some one of the offences before specified, viz. treason, &c. or has a more extensive sense, and comprehends all conspiracies.

not be tried at all, as there is no court in existence before which, according to modern practice, such misdemeanors can be tried.

JOHN MILFORD.

SPENCER PERCIVAL.

All these eminent council united in what must be the wish of every man, for an act of parliament to remedy this evil.

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No. IV.

*Notes of some adjudged Points of Maritime Law, illustrative of the foregoing Treatise.*

1743. A merchantman had been taken and rescued by the crew. The owner of the ship rescued, refused to deliver the prisoners, i. e. the persons put on board the ship rescued by the enemy, and thus captured, to the commissary of prisoners, without being paid five pounds a man and subsistence. He had no claim to bounty money under 13 George II. the action in which the prisoners were taken not having been an engagement in his majesty's service, and for annoying the enemy, but for the private interest of the owner.

1743-4. The governor and company of Rhode Island obstructed Mr. Lockman, appointed by the lords of the admiralty judge of the admiralty there, in the execution of his office. He refused to swear the deputy judge appointed by him, and undertook to appoint a deputy themselves. They afterwards submitted.

1744. A sailor belonging to one of his majesty's hired tenders was wounded by the mate of the tender, then lying in the river Thames, of which wound he died. Dr. Strahan was of opinion, that the fact having been committed in the

river, and *below bridge*, the lords of the admiralty might grant their warrant to the marshal of the admiralty to take the offender into custody, and that the *marshal* of the admiralty being also the *coroner* of the admiralty, the lords of the admiralty might direct him to summon a jury, view the body, and report to them.

1744. An officer of a man of war going on board a privateer to demand deserters, was treated with great insolence. A monition advised to be issued against the captain of the privateer, to answer articles to be exhibited by his majesty's proctor.

1744. A subject of the States General, several years in the French service, but discharged, and with his wife, a passenger on board a French man of war, on his way home to Holland was taken. He was not to be considered as a Frenchman, but dismissed, and his property restored.

1745. *Tripoly* being no part of his majesty's dominions, a vice-admiralty court to condemn prizes brought into that port, it was agreed could not be granted by law\*.

1746. A man, though involuntarily kept abroad above three years, so as to be out of the way of claiming his share of prize, was thought, however hard the case, to have forfeited it to Greenwich hospital. See 3 George II.

1746. The merchants of Oporto wanted to get letters of marque sent out with blanks for the names of the ship and master. It could not be done.

1746. A prize had been driven on shore by a man of war; the crew of a tender impeded in plundering, burnt the prize maliciously. Proceeding against them by indictment at the admiralty sessions was the mode advised.

1747. Articles exhibited in the admiralty court against the captain of a privateer for demanding shot-money.

\* Here Britain disavowed any such power as France of later years attempted to set up in Norway.

1747. A sloop belonging to Rye fired at and stopt a Norway vessel; the captain whereof having refused to pay for the shot, the commander of the sloop took away, by force, shirts and other property. Articles advised to be exhibited against him in the admiralty, to make him restore what he illegally detained, and to condemn him in damages.

1747. The centry on board a ship in Portsmouth harbour fired at a boat, without cause, and killed a boy therein. It was held that Portsmouth harbour was within the admiralty jurisdiction, and that the vice-admiral of the county, or his deputy, as coroner, might hold an inquest on board; but he not having done so, and the coroner of the county having held an inquest on shore, summoning witnesses from the ship, it was held that the admiralty jurisdiction was waved, and the trial was at the assizes.

1750. The judge of the admiralty in Ireland complained to the lords of the admiralty, that he was impeded in his jurisdiction as to goods flotsam; they were goods thrown overboard by a smuggler pursued by a revenue cutter. He was answered, that if the goods were forfeited by the laws of the customs, it was a question for the court of exchequer, even though the question of flotsam should incidentally arise. He complained also, that having seized Dublin ships, clandestinely trading with enemies during the then late war, and attached their captains for rescuing them, replevyns had been brought, and he estopped by the court of king's bench. He was answered, that if the replevyns were not well founded, the truth of the case might be pleaded, and if it was really a matter of prize, the court of king's bench would not take cognizance of it; but that this mode of complaint was indecorous. The matter had been referred to Sir Dudley Rider, and Mr. Murray, attorney and solicitor-general.

1751. Mr. Read, appointed by letters patent marshal and serjeant of the mace of the admiralty in Ireland, and water-

bailiff through that kingdom, claimed all anchorage and profits thereof. The city of Dublin claimed under their charter, granting them all droits and perquisites of admiralty in the port of Dublin, anchorage therein. It was held that anchorage is not a droit of admiralty, but a right always inherent in the crown, and cannot pass without express words, and that by grant under the great seal only.

1756. The right honourable Charles Erskine of Alva, lord chief justice clerk in Scotland, issued his warrant to arrest the lieutenant of a man of war lying in Leith roads, for an assault and battery committed on shore. The offender being on board ship, it was thought could not be apprehended by virtue of this warrant; the judge of the admiralty there issued another. The captain of the ship obstructed its execution. The admiralty there was deemed to be authorised to attach the captain; and it was held, that being in his majesty's service was no exemption from arrests either in civil or criminal suits.

1756. Commissioners of the admiralty who sign orders to an admiral, and still continue at that board, cannot sit on his court martial. Admiral Byng's case.

1757. A prisoner of war had committed a horrid crime upon another. It was held to be a matter of discretion, whether the lords of admiralty would order the offender to be prosecuted or not, he not being an English sailor, nor the offence committed on board an English ship. If they declined it, application to be made by the commissioners of sick and wounded seamen to the civil magistrate.

1758. The commissioners of oyer and terminer of the admiralty of England, can take no notice of informations made and examinations taken by the commissioners of marine of Rotterdam, or other place abroad, nor is this sufficient foundation for granting their warrant for searching suspected places, or apprehending suspected persons.

1759. A French ship taken, on board which an official

letter was found revoking its commission as a letter of marque, the crew not to be treated as pirates, but as prisoners of war; for no commission is necessary to justify the subjects of France, after a declaration of hostilities, in warring upon England, though the want of such commission may make them liable to penalties in their own country.

1760. The merchants of Dublin applied to the lords of the admiralty to direct the commanders of his majesty's ships not to molest Irish ships laden with French wines and brandies, from the ports of France to Ireland. The lords could not give any such directions, it being the duty of his majesty's ships to make such seizures, the legality of which, if at all, could only be questioned by due course of law.

1761. Persons charged with piracy on board a privateer, held to be triable by a court martial; but if they can be handed over to the admiralty sessions, or are already in possession of the civil power on shore, there seems no occasion to have recourse to this jurisdiction.

1762. An English ship belonging to private owners, and hired by French officers released by his majesty's order, may legally sail to a port in France, after preliminaries and before definitive treaty signed.

1768. The masters of merchant ships refused to pay to seamen entering from them on board his majesty's ships more than a moiety of their wages, *while abroad*. The seamen were *immediately* entitled to their whole wages, the acts of parliament regulating the payment of wages not applying to this case.

1770. On a dispute at Portsmouth, between the vice-admiral's coroner and the coroner of the county, it was held that the judge of the admiralty and the vice-admirals have, by patent, cognizance of the deaths of persons in the sea, public streams, ports, &c. that they may depute by their patents deputies to execute any act they may do themselves. That their coroner on the high seas would have exclusive

jurisdiction, and in port and beneath the bridges, at least, a concurrent jurisdiction with the coroner of the county.

1777. Naval courts martial cannot summon witnesses who are not of his majesty's navy.

1778. A letter of marque having issued eight days before a prize was taken, though the captain had it not in his possession, nor knew of it, it was good prize, and not a droit of admiralty.

1777. Certain sailors had by a rising on board a transport taken by an enemies privateer, rescued the transport, and carried her into Ireland; they demanded *salvage*. The case was not within the letter of the statute, in as much as the recaptors were not commissioned, and the retaken ship and cargo did not belong to a subject, but to the crown. Here then the court might, and I believe did not take the statute for their guide in allowing an eighth, but on account of particular merit allowed more. Case of the Molly transport.

1778. A French ship *l'Amiable Marie*, was in the month of April taken and carried into Jersey, by a non-commissioned vessel as against France, as if her cargo had been American, though it really was French. The captors afterwards agreed to restore her; but then she was re-seized on the part of the king, at the instance of the king's proctor, and claimed also by the proctor of the admiralty. Since this French ship was not brought into port by revolt, nor driven in by a commissioned ship, (which are the words of the order of council 1665), they were held droits of admiralty, and not perquisites of the treasury or exchequer.

1778. All the ships taken from France by vessels having letters of marque only against the Americans, became droits of admiralty.

1781. *Staves* ruled not to be a naval store, though in ever so great a quantity, unless it were shewn that the French at Brest were in some peculiar want of casks. In

the year 1778, it had been held that *lead* is merchandize of promiscuous use, and if found to be shipped in large quantities for the ports of an enemy, may be at least stopped and sold in England; and the same is true even of those goods which are enumerated as not contraband in our treaties with neutral nations, if of promiscuous use, and destined for the ports of an enemy in great want of such merchandize.

1781. The case of the recapture of king's ships having been omitted in the statutes giving salvage; but salvage held to be due on such recapture to be regulated at the discretion of the court.

1783. A ship unjustly detained as prize is entitled to demurrage, and the offer of demurrage in writing, together with his papers, should be offered him in presence of a notary.

1779. An enemy's ship captured by a king's tender is a droit of admiralty, and not prize to the tender.

1780. The captain of a fleet is entitled, under the order of council of 1747, to be considered as a flag officer, and to a share in the distribution of prizes accordingly. Case of Captain Kempenfelt.

Prest men are not subject to the articles of war, until actually rated on board some of his majesty's ships.

1782. The judge of the admiralty of Ireland, *then* a vice-admiralty court, held removeable at pleasure, without proof of malversation, so of Minorca 1780.

1786. The East India company, under their charter of the 31st of George II. entitled to such prizes only as are either within their limits, or taken by their ships during wars commenced by them or on their account.

1785. A sentence being silent as to the time and manner in which a prisoner was to suffer, the lords of the admiralty held to have a right to issue their warrant, and direct the time and manner, without any special warrant from the king for that purpose.

1785. An offence having been committed on the high seas, and the prosecutor poor, under age, and without friends, the lords of the admiralty were willing to pay the expense of the prosecution.

1791. Sailors from a frigate, put on shore at Messina to perform quarantine, stole goods from the Lazaretto. This is robbery within the meaning of the 30th article of war, and they triable by a court martial under the authority of the 35th.—N. B. This was made a question of much doubt on the words of these articles, and of the 36th.

A natural born subject of England residing at Rotterdam, though as to his allegiance he still continues a subject of England; yet in all matters relating to trade must be considered as a foreigner, and is not entitled to a Mediterranean pass.

The commissioners of the admiralty have a power of granting warrants to commit any person for piracy, on regular information upon oath; but cannot empower persons to search privateers, or other ships, for goods suspected to be piratically taken.

1776. An American vessel, with an English pass, and the master an Englishman, was freighted at Leghorn by Tuscan subjects to go to Alexandria. The captain changed his course, and put the Tuscan supercargo and others on shore on the coast of Africa, near Oran, and from thence to Alicant. The proprietors of the cargo applied to the British consul at Leghorn; in the mean time certain honest sailors, disapproving of the master's fraudulent conduct, which was piracy by the statute of William III. after he had sold part of the cargo, seized the ship while he was on shore, and brought her into Cadiz. The owners of the cargo conceiving she was become a droit of admiralty, applied through the consuls, Sir John Dick and Mr. Udney, in England, for compensation out of her. If she had even belonged to the captain, which did not appear, she was not

forfeited to the king, unless he was convicted. The owners of the cargo were advised to obtain his majesty's order to his majesty's consul to deliver up the ship to them, or to consent to any summary mode of proceeding, in the maritime court of that local jurisdiction where the vessel was.

1799. The ship of a neutral power, (the *Ottomans*) had been unjustly detained, and obliged to put into Malta. She was afterwards delivered up to the neutral, and by him accepted by the interference of the consul. The owners were advised, it being not a common case, to move the court *especially* on affidavits for a monition against the unjust captors, to shew cause why they should not be decreed to pay costs and damages.

The case of the capture of Jaggernaikporam, in the East Indies, in the year 1780, was a curious case of joint capture, by land and naval forces in the India company's service. The East India company were, in the first instance, entitled by their charter, to all the effects there taken; but there having been an appeal in this case, of the result of which the author has not been informed, he is not able to give the ultimate decision.

The famous cases of the *Hookskarpel* and *Oester Eems*, are in fact given by Mr. Robinson in his notes.

*Cinque Ports.* A large Dutch ship found at sea, with no person on board, nor papers to discover to whom she belonged, and carried into Dover, was held, in 1763, to be a droit of admiralty; but that the lords of the admiralty might, if they thought fit, direct proceedings against her in the port of the Cinque Ports. Enemy's ship stranded on Goodwin Sands, cargo landed at Deal, Cinque Ports have not jurisdiction, and though landed, a droit of admiralty.

In the case of the King of Prussia privateer, 1759, whose crew violently assaulted persons who came on board to seize certain sailors accused of piracy, the offence was deemed

cognizable by the admiralty sessions, though it happened in the port of Dover.

In 1751, a robbery having been committed on board the *Savage* sloop, in Dover harbour, it had been deemed to be within the jurisdiction of the Cinque Ports, exclusive of the admiralty of England.

*Courts-Martial.* The first captain to the commander-in-chief, has a right to rank next to the junior rear-admiral, as member of a court martial.

Sir Hyde Parker's Case, 1791.

Whether a lieutenant acting as master and commander, under 22 Geo. II. ch. 33. can sit as member of a court-martial, greatly doubted, and advised that the opinion of the judges should be taken.

Lieut. Peyton, 1789.

#### No. 5.

### ADMIRALTY CASES DECIDED IN IRELAND\*.

*Corish v. the Murphy.*

PROMOVENT alleged, that having advanced 99l. 4s. to impugnant, who was the owner of one half of the vessel in this cause, *for the purchase of said moiety of said vessel, and for other purposes respecting the same, the said* impugnant executed a bottomry bond to him upon the body or hull of said vessel, then lying in the port of Bristol; and to undertake a voyage from thence to Milford, and from Milford to Wexford, dated 11th February, 1795, upon the high seas and within the jurisdiction of the court, for repayment of said sum, and that it still remained due.

\* These cases are more particularly inserted, as shewing the native powers of the admiralty prohibitions having there been less frequent.

To this allegation or petition, which followed the words of the bond precisely, impugnant put in an exception, because it was not alleged that the money so advanced was for the repairs or use of the ship (the words *other purposes* being too vague and general), or that the repayment thereof was to depend upon any risk to be run by said vessel in her intended voyage, or that such repayment was to be made or depend on the event of the safe return thereof, so that it did nowhere appear by the allegation, whether said bond were in law a *bottomry bond*, so as to give the court jurisdiction.

I argued, that there were two kinds of bottomry bonds described by Sir W. Blackstone, one truly so—the other vulgarly so called, but only suable in a court of law.

That this was a bond merely depending upon the *risk* and not pledging the vessel, that no words were found in it, which could be construed to pledge the vessel. That to pledge the vessel, such express words as the following must be used: I, A. B. do bind the said ship, with the freight, tackle, and apparel of the same, as in the precedent, in Beawes, Vol. I. p. 139.—that even supposing the vessel pledged, and that it was properly a bottomry bond, yet it did not follow that the admiralty had jurisdiction—that every hypothecation of the ship does not give the admiralty jurisdiction, for if the master hypothecate under seal before the voyage begins, it was admitted in *Menetone* and *Gibbons*, 3 Term Reports, that the admiralty had not jurisdiction—so if he hypothecate, but not for necessities for the ship—that if a contract be made even upon the sea, if not for a marine cause, it cannot be sued in the court of admiralty. Hobart 12. Bridgeman's Case. Bacon, Court of Admiralty. C.

That it must be a marine contract, and for a maritime cause; it doth not appear here to be either: instances of bottomry bonds sued at law are frequent. Lev. 54. Siderfin, 27. 2 Ch. Cas. 130. Ab. Eq. Ca. 372.

Action of debt on a bond for monies taken up on bottomry mentioned. Molloy, lib. 2. ch. 10. p. 129. Cro. Ja. 208. Sharpley v. — and see 1 Atkyns 341.

Dandy v. Turner, was a case of a part owner borrowing money on a bottomry bond, payable on the return of the ship from the voyage.

A sheriff may take a ship in execution like any other chattel—why not? And if part of a contract is triable at common law, and part by the admiral law, the common shall be preferred, Hob. 212.

On the other side were quoted Johnson v. Shippen, 2 Raymond, 962. 2 Bla. 459. Molloy, lib. 2. Ch. II. s. 12. and for forms of bottomry bonds, 2 Newman, 480, 481; and it was urged that it is not the *form* of a bottomry bond which varies the jurisdiction, but the *subject matter*.

The court was of opinion that the vessel was hypothecated, for the party run the risk on the hull of the ship, and it would have been unnecessary to mention the hull or body of the ship otherwise. That the mere form of the bottomry bond did not signify, if the meaning of the parties was clear; and that this was not an unusual form, there being in Wood's Complete Conveyancer, under title *Bond*, a precedent very like to it—that where it did not appear where it was executed, the court would not presume against its own jurisdiction, especially as if it did, the parties could not have the same remedy in courts of law, the sentence of this court going *in rem*.

#### Pillans v. the Victoria.

This vessel, captured in 1779 by the Shillelagh privateer, Captain Pillans, and brought into Dublin, was condemned as prize by the court of admiralty in Ireland. The lords commissioners of appeal in England, in the year 1781 (the Irish being then only a vice-admiralty court), reversed the sentence, on the ground that at the time of the capture,

hostilities had not commenced between Great Britain and Spain; and ordered the ship and cargo to be restored to certain claimants in London, and gave costs but no damages. In 1788\* their lordships were applied to, with a complaint that restitution was not fully made. It was decided that the captors were answerable for any deficiency in the ship, if it had been plundered, but for warehouse-room of the cargo, and such things, captors were not answerable, no damages having been given. Sale of the ship, though decreed below, not having been made, marshal of the court was not entitled to any commission.

*Parry and others v. the Peggy, Captain Gibson.*

The promovents had agreed for monthly wages, for a voyage to the West Indies. They worked on board the ship for some days in the harbour of Dublin; afterwards Mr. Maguire, the owner of the ship, having changed his mind, determined to alter the voyage, and to postpone the sailing of the ship, whereupon the seamen were dismissed without their wages, who now libelled against the ship. As surrogate of the admiralty, I decreed for the seamen on the reason of the thing, and the authority of *Wells v. Osmond*, 2 Shower, p. 238.

*Murphy v. the James.*

Mariners had engaged by the run from Liverpool to Dublin. Most severe storms, in February 1799, drove the vessel inevitably into Milford-haven, where she was *necessarily* detained by the weather sixteen days. Mariners who engage by the run are not entitled to any extra wages on account of any such accidents, unless it be by some subsequent agreement. Their run money is considerably greater than it otherwise would be, because they take their chance of all such accidents.

\* It is therefore that I insert the case, though the question of prize was determined so long before.

Mitchell and others *v.* the Favourite Nanny.

This was a suit for seamen's wages. William Grunderson took defence, and pleaded that he was master and owner of said vessel; and that he had on the 8th of February, 1793, agreed with the regulating captain in the port of Dublin, who acted on the part of the judges of the admiralty, that she should be taken into the service of his majesty as a tender—that she was so accordingly, and put under the command of a lieutenant of the navy; and that the promovents knowing the premises entered with the said lieutenant, and that therefore their wages were only demandable at the navy-office of *England*, and suable and recoverable *only* in the high court of admiralty of *England*, and not in this kingdom, nor against the said Grunderson.

To this we replied, that supposing, but not admitting, the law to be as mentioned in the exception, that it was irrelative, because they entered with Grunderson the master of the ship before she was hired for a tender, *absque hoc* that they entered with the said lieutenant. This fact being proved, the point of law was not decided.

— *v.* the Jenny of Pengelly.

The promovent alleged, that he being a merchant of Waterford, had laden certain flour on board this vessel, which, as appeared by the bills of lading signed by him and Robert Davies, the master of the ship, the said master contracted safely to deliver in Dublin; and that the said master had been guilty of a breach of contract, the flour being embezzled, or not delivered.

The impugnant put in a declinatory exception instead of an answer, in which he said that the contract was entered into within the body of a county within this realm, to wit, at the city of Waterford in the county of the said city; and that the said bills of lading were signed, and the said

ship was then lying, and the said flour delivered in the county of the said city of Waterford, and not upon the high seas, nor within the jurisdiction of the court of admiralty; and therefore he prayed right and justice, and that the court would not take cognizance of the matter, and that his exception should be decreed valid with costs.

For the promovent it was insisted, that by the famous articles, 1632 (see Cro. Ch. 296. 3 edit.), it was settled that suits might be brought in the admiralty for the breach of charter-party, provided their existence was not disputed (which is the case here), and provided the penalty, if any, was not sued for, and that a bill of lading differs from a charter-party only in this, that the first is required and given for a single article or more laden on board a ship that has sundry merchandize shipped for sundry accounts, whereas a charter-party is a contract for the use and freighting of the whole ship—but the same reason extends to both. And that the old and absurd notion of *locality* superseding the *nature* of the contract, was long since exploded.

The admiralty in this case decreed for its jurisdiction, and no prohibition was applied for. See Roll. Ab. 530. l. 40.

Wood v. the Hannah.

1799.

This brig, bound from Maryport to Dantzic, was captured by a French privateer on the coast of Norway, and carried into Christian-sound in that kingdom, which is a neutral port; condemned as prize by a court of admiralty there, and sold to a neutral subject; she was afterwards repaired, so as almost to become a new vessel, and got a new registry, and was sent by her new proprietor with a cargo to the port of Belfast in Ireland, where Wood, of Maryport, her former owner, seized her under a warrant of the Irish court of admiralty, alleging that the condemnation

and sale of the said brigantine or vessel at Christian-sound was an illegal condemnation, and that the property was not thereby legally changed.

There was some question about the facts, as to the distance of the vessel from the coast of Norway when taken—more about the law, viz. as to the old question, when a ship is said to be truly brought *infra præsidia hostium*, and the true interpretation of these terms, and also as to condemnations by neutral powers. (See the case of *Goss v. Withers*, 2 Burr. 683.) but the arguments and authorities cannot be here adduced, because,

*Adhuc sub judice lis.*

Archer and others *v.* the Ann of Dundalk.

29th May, 1796.

Promovents filed their libel in the court of admiralty, stating that on the 8th of February preceding, they being in the harbour of Ardglass, in the county of Down, on board a boat or smack called the Esther, of which they were the crew, observed the hull or body of a ship, at a considerable distance out at sea, drifting towards the north-east. That they sailed towards the ship, came up with her twelve miles distant from the shore, and found her to be the Ann of Dundalk, abandoned by her crew, and not a living creature on board. That they did every thing they could to protect the vessel, which however had been previously plundered, and brought her to Skerries on the 9th of February. That when brought into the harbour of Skerries she was worth 300*l.*—that her cargo was worth 600*l.* and actually sold for 420*l.* And they prayed to be decreed to the vessel and cargo, or such proportion thereof as the court should please. The admiralty was proceeding in this suit, when stopped by the consignors of the cargo of the vessel moving for the following prohibition.

K. B. Motion for a prohibition to the admiralty.

Glascot v. Archer.

Easter, 1796.

Plaintiff, to whom the cargo of the said ship Ann was consigned, filed a suggestion, stating that by the laws of this realm, the rewards which ought to be given for saving ships in danger of being wrecked, in proportion to the merits of the salvagers, are to be adjusted by two or more neighbouring justices, and are not cognizable by the court of admiralty\*.

That the ship Ann of Dundalk, being in danger of being wrecked, was saved by the crew of a wherry belonging to Skerries, assisted by the defendants in prohibition, who were the crew of another vessel called the Esther smack. That they had given the crew of the said wherry a recompence, and had also settled with one Mr. Mulholland, who said he was authorized by defendants in prohibition to settle for them, and had paid him 25l. accordingly.

Defendants made affidavit in answer, swearing that they never had so authorized Mulholland, and never had received any recompence—that the cargo was insured to a great amount, and the insurance since paid to plaintiff Glascot, and that said now plaintiff had, by giving bail in the admiralty, submitted to its jurisdiction.

For the plaintiff in prohibition it was said, that though before the salvage acts the admiralty had jurisdiction, that was now taken away. That though courts of common law could not be ousted but by express words, yet it does not appear to be so in other courts, nor necessary to exclude *inferior* jurisdictions. That these statutes speak of ships in *danger* of being stranded or run on shore, which was the case here, and also of holding out false lights, and therefore must relate not merely to ships wrecked upon the shore, but must extend to a considerable distance therefrom. That

\* The principal salvage acts in Ireland are 4 Geo. I. 11, 17; and 32 Geo. II. 15. 16; 23 and 24 Geo. III.

they speak of plundering a ship in distress, therefore every ship in distress is by them within the jurisdiction of the law courts—and talk of causing a ship to be carried into port, must mean therefore a ship upon the high seas. A port or haven is within the body of the county, 4 Inst. 138. so is any place above low water-mark, 4 Inst. 139. so is any coast, shore, or harbour, Mo. 892.

On the other side it was insisted, that though wreck was not within the jurisdiction of the admiralty, flotsam and derelict at sea certainly was. That admitting that express words were not necessary to oust an inferior jurisdiction, the argument did not apply, as this was a high and ancient court, and that the parties had allowed the jurisdiction of the court.

Cases cited were 2d Brownlow, 30. *Dike v. Brown*. 2 Lord Raymond, 835. Sir Lionel Jenkyns, Vol. I. p. 81. *Beawes Lex Mercat. tit. Salvage*. 1 Siderfin, 178. and numerous quotations as usual were made from 4th Instit. The matter was compromised by the advice of the court.

#### Case of the Fly Sloop.

Three merchants of Belfast entered into a charter-party for the Fly sloop. They freight her from Belfast to Malaga; she returned loaded with wine. The captain, without their knowledge, took wine on board in illegal casks, and also smuggled; and the ship proving in distress, and having no coast cocket or licence on board, was seized.

The commissioners of appeal discharged the ship, condemned all the wine.

The ship had been insured, among other things, against the barrettry or fraud of the captain or crew, as is usual. A quere was made.—Could the freighters recover against the insurers, and they again in their return in the af-freighter's name against the captain or owner, and if so,

what proceedings, whether by attachment from the admiralty, writ of justices, or otherwise, and at whose suit, to attach the ship to answer either an action of damages or bill of costs?

It was the opinion of counsel, that the affreighters might well support an action of covenant against the master of the vessel on the charter-party, for the sum of 500*l.* which was the penalty mentioned in the charter-party, or a special action on the case against him for their whole damages; but as it was stated that the master was worth nothing, they thought it would be most advisable to come upon the vessel, and for that purpose institute a suit in the admiralty court against her on the charter-party, not praying that the vessel should be sold for the 500*l.* the penalty in the charter-party, but for their damages in general; and in such suit they might procure a warrant of the admiralty court to arrest the ship. This was thought their only possible remedy, though not without risk of a prohibition if applied for. The advice was followed and succeeded.

*Briggs v. the Perseverance, George Tetherly Master.*

Two brigs, the *Ann* of Whitehaven, Joseph Briggs, master and part owner, and the *Perseverance*, of Appledore, Tetherly, master, encountered each other in the Irish Channel, on the 30th of May, 1795, in a very thick fog, and by the collision the brig *Ann* was sunk, which was the origin and foundation of the present suit. The stroke was between and upon the larboard bows of each vessel.

It was agreed that the *Perseverance* was steering her course N.N.E. and the *Ann* her's S.S.W. with her starboard tacks on board; and with respect to the wind the parties differed only as far as one point, the *Ann*'s crew insisting it was S.W. the *Perseverance* that it was S.W. by W.; it was not controverted that the wind was rather fresh; the *Perseverance* then going at the rate of seven

knots an hour, the *Ann* at the rate of five—and that the *Perseverance* was going nearly before the wind, or *going large*, and that the *Ann* was in the position called by seamen *close hauled*.

Briggs admitted that the fog was so thick, that his crew could not see the *Perseverance* until within 100 yards, but insisted that he was sailing into the fog, and the *Perseverance* out, and brought evidence to prove that some of the *Perseverance's* crew had declared they saw the *Ann* ten minutes before the stroke; which was opposed by counter evidence, that went also to prove that the fog was equally thick all around.

It was proved beyond controversy and not disputed, that of nine persons, which was the number on board each vessel, every one was upon deck in the *Perseverance* at the time of the stroke, and some looking out forward—whereas on board the *Ann* the captain was in bed, and of the ordinary watch one was absent; and of the other three, one was at the helm, and the remaining two intent upon splicing a rope and standing on the quarter-deck. The party of the *Perseverance*, therefore, accused the *Ann* of such gross negligence in not keeping a look-out, as made them answerable for all the consequences.

Another grand question arose, as to what was the duty of each ship, after its crew saw the other. It was admitted that the rule of the marine law is, that the ship going *large* or before the wind, should give way to the ship going *close hauled*, or across the wind.

This rule the crew of the *Perseverance* insisted they obeyed by going to *leeward*. The *Ann's* captain insisted they ought to have gone *astern*. They answered they *did* in the true meaning of the term, and if any thing else was meant, it must be that they ought to have gone to *windward*, contrary to the universal rule.

It was insisted also by the *Perseverance's* crew, that they did their duty, in putting her helm *a port* or *hard a weather*,

and in lowering their mainsail—that the helm of the *Ann* ought to have been put *a lee* (about which fact there was a contrariety of evidence), and her foresheet let go, and jib hauled down, which if there had been a man forward might have been done in an instant, and would inevitably have prevented the collision; that these last steps were not taken Briggs did not deny, but said it would have been impossible in the time.

In a case fit only for a jury of seamen (and which the impugnant earnestly urged the promovent to have tried by a jury in London, where cases of that kind frequently occurred, and the assistance of a master of the Trinity-house was often afforded to the judge at nisi prius), the judge of the admiralty obtained the assistance of the senior captain of the British navy, Sir A. Schomberg, who is resident in Dublin, as his assessor; and the parties added to the council, two gentlemen very respectable in the profession, and who had been in earlier life officers in the navy, Mr. O'Dwier and Mr. Barnes. The assessor, high in character as a man and as a seaman, was at first inclined to impugnants, but ultimately thought them wrong. The judge (though, as he said, not for the reasons given by his skilful assessor), decreed for the promovents, and the decree was affirmed on appeal to delegates by three common law judges, but without specifically giving their reasons.

Briggs v. Sir Annesly Stewart and Richard Williams.

The defendants, who were bail for the *Perseverance* in the case preceding, conceiving the decision a hard one, thought themselves entitled to take any legal advantage. In the stipulation they were bail for the brig *Perseverance of Appledore*, John Tetherly master.

The suit was erroneously instituted against the *Perseverance of Swansea*, George Tetherly master, and the promovents, though informed of the mistakes, persisted in it, in order, as was said, to deprive impugnants of George Tetherly's evidence, which would have been very important.

This was sworn by impugnants on an application made early in the cause to the court of admiralty, to amend and alter these names, which that court refused, because *George Tetherly* had been registered as nominal captain to avoid impressing; the consequence was, the decree and monition in pursuance of it could not correspond with the stipulation entered into by the present defendants.

June 28. A rule on the bail to bring forth the vessel.

July 5. Monition to the bail to pay debt and costs.

The bail paid no attention to these rules, conceiving that they were irregular, inasmuch as execution should have been against the vessel; and then if she could not be found, a rule on the bail unless cause, just as at law a *scire facias* doth not go against bail, until a *capias* against the principal be returned.

The bail, however, an order having been made to attach them, appeared on October 21, and moved to set aside the proceedings for the reason above, and also because the monition was against the brig *Perseverance* of *Appledore*, *George Tetherly* master, and therefore not conformable to the stipulation, which was for the brig *Perseverance* of *Swansea*, *John Tetherly* master. *Rule*. Proceedings set aside with costs against the bail, and a new monition to issue conformable to the stipulation.

November 6. Commission of appraisement and sale to go against the vessel, and so much of the rule of the 21st of October, as related to the bail paying costs rescinded. November 11. The vessel not being to be found, the commission of appraisement and sale vacated. December 18. Ordered that the taxed costs, in the court of delegates, be added to the monition, although we insisted that the bail never bound themselves to pay the costs of the appeal, but there should have been new bail as on writs of error in the law courts. See *Clark's Prax. Ad.* 5th edition, note to p. 16.

1796. February. A monition having issued conformable

to the stipulation, Dr. Browne moved the court to set aside all the proceedings against the bail, as the monition (though now conformable to the stipulation) was not agreeable to or founded upon any sentence or cause existing in the court, nor were the bail bound for the vessel against which a decree had been pronounced in a cause entitled Joseph Briggs against the Perseverance of *Appledore*, *George Tetherly* master, nor ever entered into any recognizance for the production of any such vessel. The motion was refused, and leave given to the promovent to apply for permission to amend.

The promovent accordingly on a subsequent day moved for leave to amend the *bail bond* by altering the word Swansea to Appledore, and John to George; which we opposed on the ground, that it would be a most arbitrary, unlimited, and unprecedented exertion of authority to make a man bail for a ship or a person whom he never proffered to be bail for. That if any amendment were to have been made, it should have been when we applied in the beginning of the cause, in which case we should have had the benefit of George Tetherly's evidence: but to say that he shall be considered as the master while the cause continued, so as to deprive us of his evidence, and that the stipulation should now be altered in order to get at the bail, would be a double injustice. That, however our defence might be *inter opices Juris*, it was one that courts of common law had never presumed to dispise or to decide against. See 3 Lev. 235.—Mod. Ca. 309.—1 Salk. 102.—Moore, 694. 407.—1 Mod. 5.—2 Jon. 188.—Cro. Eliz. 223 and 458. and the sayings of Lord Kenyon in *Owen v. Nail*. 6 Term Reports, p. 705. where he says, "although we hear objections of this kind with some prejudice, yet we must take care, in our earnest desire to do justice, not to transgress the limits of the law."

The court gave leave to amend the stipulation, but an appeal has been brought.

## Boulger and others v. Ship Anne.

The promovents *mariners* stated, that the said ship of whose crew they had been, was wrecked on the 5th of October, 1795, on the coast of Norway; that Scallan the captain had received a large sum of money, the produce of the sale of the wreck, and that seamen's wages were the first money that ought to be paid thereout. Scallan applied to the court of king's bench for a prohibition, after sentence had passed against him in the admiralty, on four grounds, 1st, that it was a contract made on land; 2dly, though beyond seas, yet for payment of money at home, and the contract to be completed at home; 3dly, that at the time of issuing the warrant, the said Scallan was not master of any ship; 4thly, that the contract was special, and also under seal.

The three first points had no weight; the last, if it had appeared *upon the face of the proceedings*, would, as it seemed, in the opinion of the court on the authority of *Howe v. Napier*, 4 Burr. 1944\*, have been sufficient to obtain prohibition, but *after sentence*, nothing will avail which doth not appear on the proceedings. The party here even acknowledged it was a matter *dehors* the proceedings, by supporting his suggestion by an affidavit, which, if it appeared upon them, would not have been necessary. Prohibition refused.

## Lalor in Prohibition, K. B.

In the last case, the court of admiralty had attached Lalor for rescuing Scallan, who had been arrested by an admiralty warrant. Lalor applied for a prohibition, insisting

\* With great submission however the case of *Howe v. Napier* as far as relates to contracts under seal ousting the jurisdiction is contradictory to Lord Holt in his Reports, p. 50. and is contradicted by Menetone and Gibbons, 3 Term Reports, but in truth the case of *Howe v. Napier* went on the conjoint circumstance of its being *under seal*, and also *special*, and perhaps in reality upon the latter only.

that the court of admiralty has not jurisdiction or power to attach for contempts, unless committed in its sight and view. His counsel cited Vaughan, p. 1.

I argued that no court can support itself without a power of punishing contempts, and that it was an absurd distinction to say the court could attach for assaulting an officer of the court in its presence, but not if he was assaulted a yard from the door. To look therefore for authorities seemed superfluous, for to use the words of Judge Blackstone, laws without a competent authority to support their jurisdiction would be vain and nugatory; therefore the process of attachment must be as ancient as the courts themselves, 4 Black. Comm. p. 285. ch. 20.

It is objected it cannot attach in the present case, because it is not a court of record. That cannot be the principle, for so neither could it attach for contempts in its presence. The court of chancery is not a court of record, yet attachments were borrowed from it; until sequestrations were invented, its whole process was in nature of process of contempt.

It is said a justice of peace cannot fine but for contempts *in his presence*. To compare that office with this high court of ancient jurisdiction is not a fair analogy. But what can the justice do?—He can, immediately upon information given to him of a rescue, issue his warrant, and have the man taken up. The ecclesiastical court can excommunicate, but this court would be helpless; for surely it will not be said, that this high court is every moment to apply for aid to a justice of peace or a court of law, or else to desert its officer, and leave him if abused merely to his action?

I admit the case in Vaughan, p. 1. says, this court may attach for contempts *in its presence*, and these words have been, perhaps carelessly, copied by Judge Blackstone in his Commentaries; but there are no *exclusive* words superadded.

—It is no where said *directly* that the court shall not attach for contempts committed at a distance, and I think 12 Mod. 246. and 1 Lord Raymond, 446. *Rigden v. Hedges*, shew that it can.

I take the true and only distinction to be, that if the contempt be committed in the face of the court, the offender may be instantly punished without further examination; but in matters that arise at a distance, there must be a rule to shew cause\*; and Sir W. Blackstone admits this is the distinction in the law courts, 4 Black. ch. 20. p. 285.

Although it be not a court of record, it may by custom of the court amerce the defendant at its discretion, 13 Rep. p. 53. and this is a warrant, not properly an attachment. As to arresting the person here, see 1 Roll. Ab. 53. *Godbolt*, 193. 3 Black. ch. 7. p. 109.

Other cases cited were, 1 Lev. 253. 1 Salk. 136. 1 Term Rep. 555. 3 Black. Comm. 113. 2 Sellon's Practice.—*Horan v. Blacquiere*. Palmer, 422. Noy, 77 and 27. *Watkin's case*, Latch, 114.

The court of king's bench granted the prohibition, but without specially assigning their reasons.

#### Harrison v. the George.

The promovent stated by his libel, that on the 20th of September, 1796, he had been engaged by Joseph Toole, the master of the *George*, to go as mate of said vessel a voyage from Liverpool to Oporto, and from thence to Dublin, at the monthly wages of 5l. 2s. 4½.

That on the 22d, the vessel sailed, and on the 29th, nine days after his hiring or engaging as aforesaid, she was captured by the *Vengeur*, a French privateer.

That the said Joseph Toole, in order to regain the said

\* The English court of admiralty, I am informed, makes an absolute rule at once, so that the party must appear in custody. Sed quere, does Clarke's *Praxis Adm.* agree with this?

vessel for the owners thereof, proposed a ransom of 300 guineas to the master of said privateer the Vengeur, and did accordingly ransom the said brig the George for the said sum of 300 guineas; and in pursuance of said agreement a ransom bill was executed, and promovent was delivered up by said Joseph Toole to the said master of the said privateer, as an hostage, until said ransom money or 300 guineas should be paid, the captain of the said privateer refusing to deliver up said vessel without such hostage; and promovent, in consequence thereof, was carried into Dunkirk in France, where he now remains in close confinement, and the said brig the George was then suffered to prosecute her voyage.

That at the time promovent was delivered up an hostage as aforesaid, the said Joseph Toole then and there *promised to pay promovent*, during such time as petitioner should be in confinement for said ransom money, and until promovent should arrive at Dublin, where said vessel was bound, 10l. 4s. 9d. per month.

That the said brig the George, her tackle, apparel, and furniture, at the time of the said taking, was worth the sum of 2400l. sterling.

That from said 20th day of September, the time promovent was hired, to the 29th, being nine days, at the rate of 5l. 2s. 4½. promovent earned a sum of 11. 10s. 9d. and from the said 29th, the time promovent was delivered as an hostage, to the 1st day of March instant, during which time promovent has remained a prisoner for the said ransom money, is a period of five months, which at the rate of 10l. 4s. 9d. per month as agreed on by the said Joseph Toole to be paid to promovent as aforesaid, makes a sum of 51l. 3s. 9d. which together with the said sum of 11. 10s. 9d. makes a sum of 52l. 14s. 6d. Irish, out of which promovent, by himself and his wife, received a sum of 11l. 18s. 10½. Irish, which leaves a balance due to promovent on the said 1st day of March, amounting to 40l. 15s. 7½.

That said brig the George performed her said voyage to Oporto, and arrived safe in the port of Dublin, has discharged the cargo she had taken in at Oporto aforesaid, and has been in the harbour of Dublin these three months past, and promovent has not as *yet been ransomed*, or his said *balance of wages* paid him. Notwithstanding promovent, by several letters written by him to Mary Harrison, promovent's wife, which are now ready to be produced, and by a regular power of attorney executed by him, has authorized and empowered his said wife to receive said wages, and give receipts for the same.

That promovent is now reduced to the greatest distress and poverty, and in want of the common necessities of life, and his health is much impaired by his confinement, and the severity of the treatment he has received thereby.

That said brig or vessel has been duly arrested, and is now in the custody of the marshal of this honourable court, and so *ended his libel*.

For the impugnant, I insisted that if this suit was for wages, it could not lie, since the promovent admitted he was paid considerably more than the wages earned by him, from the time of his agreement in Liverpool to the day of the capture; and as to any subsequent time, he could not be entitled to any wages, since they were forfeited by the capture, even though the ship be ransomed afterwards, 2 Lord Raymond, 1212. *Wiggins v. Ingleton*; so if the ship perishes by tempest or fire, for otherwise the mariners would not use their best endeavors to save the ship. *Molloy*, lib. 2. chap. 3. sect. 10. 2 *Siderfin*, 179.

If a ship perishes at sea, they lose their wages, and the owners their freight; if she comes to her first delivering port, they have wages till then; if lost afterwards, they lose their subsequent wages.

It is said, says Judge Buller, in *Yates and Hall*, 1 Term Rep. 79, that if the ship be ransomed, and proceed on her

voyage, the sailors will be entitled to their wages. No authority, saith he, has been cited to support that position, and the general rule of law is, that if the ship be captured, the wages are lost. The ransom (continues that learned judge) is a new purchase of the ship, and it will require great consideration before it is determined, that after a ransom the owners shall be liable to pay wages even for the time which elapsed before the capture.

Since then this suit could not be said to be for wages, it must be founded on the captain's contract with *promovent*. This I argued, 1st. was a mere personal contract, not pretending to bind the ship. 2dly. If it did affect to bind the ship, it was so far void, because that so it would much exceed the captain's powers. 3dly. That at all events it was void, under the Irish act 21 and 22 Geo. III. cap. 54. sect. 2. made in imitation of a similar one in England, against ransoming captured ships.

1st. The contract doth not mention the ship, it is not bound then by any express words; the words of the libel are, *Joseph Toole promised to pay promovent*. It is stated therefore by the party himself, that it was only his *personal* promise—not a word of the ship, or of the owners: by what violent implication then is it here made to extend to the ship?

2dly. Suppose it be construed to extend to the ship, the master or captain had no such power. The principle upon which the law holds the owner liable for the contract of the master, is, that the master is considered merely as a servant to the owner. Molloy, 228. *Rich v. Coe*, Cowper's Rep. 636. Now could a servant bind a master to do that which is impossible or illegal, as is here the ransom; or disadvantageous, as to pay so much a month, for an indefinite time, until an act be done, which act is forbidden by the law? But suppose that the *promovent* could sue the owners in a court of law, on the captain's contract; how doth that entitle him to come upon their ship in this court? The

master cannot hypothecate the ship whenever he chooses arbitrarily. It must be for the necessities of the ship while at sea, or in a foreign port; if he borrow money for the use of the ship before the voyage commenced, it doth not give the admiralty jurisdiction.—*Menetone v. Gibbons*, 3 Term Rep. 267, if the master borrows money to repair the ship, when there is no occasion, he alone is personally debtor.—*Molloy*, 315; every contract, even for the benefit of the owners, doth not bind the ship; but surely a contract to pay 120l. a year, probably during promovent's life, where a ship was actually insured, may be to them a most destructive bargain; but above all there is express authority, that the master cannot make the ship security for any person's redemption but his own.—*Molloy*, book 2. chap. 6. sect. 13. and so it was by the Rhodian laws. See besides the cases already cited, 3 Burr. 1844. *Douglass*, 539, *Abernethy v. Landale*. 1 Ventris, 147, 12 Mod. 442, *West and West*.

3dly. I come now to the Irish act 21 and 22 G. III. cap. 54. sect. 2. all contracts and agreements entered into, and bills, notes, and other securities given by any master of a captured ship or vessel, or other on board or belonging, for ransom thereof, or of any merchandize, or goods on board, shall be absolutely void and of no effect; how can this be evaded but by saying that this was not a contract for the ransom—not made with the captor—but made with a third person? In construing acts of parliament we are not to quibble—plain rules of construction; look into the reason of the act. Every statute ought to be expounded, not according to the letter, but according to the intent, 2 Rol. 318. Pl. Com. 350—363.—If the enacting words can take in the mischief, they shall be construed for that purpose, though the preamble does not warrant it. *Basset and Basset*, 3 Atk. 203. So the ground and cause of making a statute explain the intent. Pl. Com. 173, 204.

The word *for* many mean—*Because of*—*Hooker*.—*With respect or regard to*—*Stillingfleet*.—*For the sake of*—*Cowey*.

—*In search of*—Tillotson.—*In hope of*—for the sake of—  
Shakespeare.—*In regard of*—Addison.—*On account of*—Ashe's  
Dictionary.

The promovent's counsel opposed to this reasoning many and ingenious arguments, to which I could not do justice without possession of their notes, particularly that this was not a contract for ransom, but collateral thereto, and not within the act of parliament; to which it was replied, that then by this kind of subterfuge, it was easy to see how, without any actual agreement between the captain and the enemy, the act might be eluded.

The court decreed for promovent, and gave the wages up to the day of the decree, so that the sum decreed exceeded that mentioned and prayed in the libel, which the impugnant's counsel conceiving to be erroneous, for that and the other reasons above mentioned, appealed, but the sentence was affirmed in the delegates.

The promovent then proceeded against the bail, not merely for the sum for which they had engaged by their stipulation, but for a much larger sum, viz. the whole sum decreed, and the bail having come in to shew cause why they should not pay a larger sum than that mentioned in the stipulation, the motion was refused, upon which they appealed, which appeal is still depending.

#### Commission of Adjuncts.

In *Pentland v. Mallie*, the court of delegates had been equally divided. Application was made to the court of chancery for a *commission of adjuncts*. The application being novel in this country, the court desired it to be argued, which was done with great learning, and I am sorry that want of room forbids me to insert the arguments. The court was soon satisfied that there could be no doubt of the propriety of the application (which applies equally to the court of *admiralty*) but the parties compromised.

## Commission of Review.

*\*Opinion given by a great English Advocate.*

His majesty has a power of granting a commission of review after the sentence of the delegates if he is advised so to do, but such a grant is mere matter of discretion, and by no means *ex debito justitiæ*; such grants have been rare at all times, and of latter years have been discountenanced to a degree that may be considered as amounting to a total extinction of the practice. The last case, when it was applied for, was in the case of Hoogskarpel, a prize cause. The history and nature of the prerogative of granting commissions of review was fully enquired into on that occasion, and the court (in which Lord Camden presided), held that such a power was exercised by the sovereigns of countries in which the civil law and canon law were permitted to govern the tribunals either in whole or in part, such a power having taken its rise in the more corrupt ages of those systems of jurisprudence.—That this power having been anciently exercised in the ecclesiastical tribunals of England by the Pope, devolved of course to the crown, by virtue of the statutes which transferred the supremacy at the time of the reformation, at least that it had been so held upon an adjudged case where it was brought in question, though, as Lord Camden observed upon very unsatisfactory grounds, that would hardly have led to such a judgment in later times against the positive language of statutes, which declare the sentence of the delegates to be final; that it was a prerogative not to be countenanced, being the growth of dark and despotic times, and tending to introduce matter of favour into the regular administration of justice. Lord Camden added, that he thought it likely that would be the last application that ever would be made for a commission of review, at least

\* In *Evans v. Napier*.

he would venture to say, that such an application would never be successful\*.

**Briggs, v. Sir Annesly Stewart and Williams.**

This cause came on to be heard on the appeal. It was strongly urged again that the bail were made to be security for a different ship, from that for which they proffered to be security; but the court was unanimously of opinion that it lay upon the appellant to shew that they were different ships, and unless some ground was laid to excite a suspicion of their diversity, they would presume their identity. It was urged on the part of the appellant that the judge below had nothing to amend by, and that to amend the bail bond or stipulation by his own sentence was absurd, as that sentence had nothing to warrant it as to the names of the ship and captain; to which the respondent answered, that the insertion of those names in the sentence was justified and supported by the manner in which the original appearance of the appellant's proctor was entered; but this entry was not shewn or proved to the court. The appellant's strongest arguments were, that they, the bail, in consequence of this change of names, never could recover *over* against the persons for whose ship they had given security, and if they took the ship itself, they could not send her to sea, because the name under which alone they could legally take her, would differ from her name in the registry. The respondents said they had in the contest taken her name from the custom-house registry. *Decreed, male appellatum.*

**Wood v. Hannah.**

This cause, since the printing of the former part of the Appendix, has been disposed of. An exception was on the

\* See an urgent application for a commission of review in Fearon's case, 5 Vesey, Junr. Reports; it was there refused. It was since granted in Ireland in the case of Geisler v. Higginbotham, because parol or viva voce evidence had been admitted after publication.

9th of May, 1799, put in by the Danish captain to the jurisdiction of the court of admiralty, stating that the vessel had been on the 20th April, 1798, taken by a French ship of war near the coast of Norway, beyond the neutral limits, and carried into Christiansand, and there condemned by the decree of a *French vice-admiralty court*, (for such it appeared to be) *authorized by the law of Denmark*, and by the law of nations, and allowed by the treaties between France and Denmark, and Denmark and England, and stiled the court of the *chancellerie* or *chancery* of the French *consulage*, for the French republic at Christiansand\* : that the vessel was under said decree set up to public auction by his Danish majesty's city register, and sold in open market, and there purchased bona fide, by the merchants; that she was almost entirely rebuilt, and got a Danish registry, and then, by a bill of sale ratified by the Danish burgomaster of the place, was sent under his command to the port of Belfast, where she was seized by the promovent in said port; and upon all these grounds the party did *except to the jurisdiction of the court of admiralty* in Ireland, *inasmuch* as the sale of the ship was executed upon the land, and if any wrong was done to promovent in purchasing said vessel, it was done upon the land, viz. at Christiansand in the kingdom of Norway, and not upon the high seas, nor within the jurisdiction of this court; and even if the said purchase could be considered as in any wise connected with the original capture, the said capture is not within the cognizance of this court, *inasmuch* as it hath not any prize commission.

The long vacation approaching, and the impugnant being apprehensive that the exception might not be disposed of until the next term, *applied* to the court of king's bench for a *prohibition*, which was strenuously opposed.

\* Such a court, however extraordinary, has been permitted, and held in the war of 1761 in Norway, both by English and French consuls, and in the present war for some time in America.

Counsel against the application insisted, that this was a prize question triable only by the court of admiralty; that it was in vain to try to separate the question of sale from the question of condemnation and of the authority of the court of Norway, since the sale is derived from the condemnation, and the bill of sale recites the sentence in Norway; that the question as to the legality of that court, or the propriety of its proceedings, was a question of the law of nations, not properly cognizable by courts of common law.—That a sale in market overt must be perfectly free from fraud, which even though unknown to the buyer would vitiate it.—That the old idea of a prohibition going because it was a contract upon land, in *partibus transmarinis*, was done away in *Menetone v. Gibbons*, 3 Term. Rep. That even supposing this were a mere question as to whose property the ship was, the admiralty has concurrent jurisdiction, and suits for restitution have been frequent there, and that any authorities cited to support this application could only be from obsolete and antiquated decisions.

On the other side I argued, *first*, that this was a mere question of property, viz. Whether a ship belonged to *A.* or *B.* the proper subject of an action of trover or replevin, but with which the court of admiralty had no more to do, than with a dispute about property in a *house*, unless the name of *ship* had some magic in it, which always and necessarily gave the admiralty jurisdiction, which no person would assert; e. g. a ship might be mortgaged for a law debt not springing from any maritime cause, or it might be taken in execution by a sheriff, and who would think of applying to the court of admiralty in any such case? So if sold from hand to hand, the vendee, to get possession of her, would never think of applying to the court of admiralty. We must recur to the principles that give that court jurisdiction, there must not only be a lien on the ship, but that must also spring from some maritime cause; but neither a covenant totally irrelative

to maritime affairs, although binding a ship, nor a quasi tort by peaceably getting possession of a ship in such manner as this, would give the admiralty jurisdiction : and so is *Violet v. Blague*, Moore, 891, and numerous other cases.

That even supposing the admiralty *generally* to have jurisdiction, it was here ousted by *particular* well known rules. If the libel be for the *ship itself* being in a port or haven, the admiralty jurisdiction is ousted. See the case just mentioned of *violet* and *Blague* in Moore, and also reported in 2 Croke, 514.

So if the libel be for a matter done on land, particularly in *partibus transmarinis*, prohibition lies, see Hob. Rep. 11. *Bridgeman's case*, p. 79, *Palmer v. Pope*. Cro. Car. 603, *Ball v. Trelawny*, 12 Co. 104. *Tomlinson's case*, 1 Roll. 528, l. 50 ; nor was the case of *Menetone v. Gibbons* an exception.

So if the libel be for a matter where the original was upon the sea, but afterwards there is an act upon the land whereby the property is altered, as if goods taken (by pirates even) are sold on *land* in market overt, and vendee is sued in the admiralty, prohibition goes, 2 Brownlow, 29, 1 Roll. 531, l. 52 ; and the effect of altering the property is further seen in this, that if a ship be taken by enemies at sea and afterwards retaken, it shall be tried by the common law, 2 Brownlow, 11. *Weston's case*, 4 Inst. 154.

All these circumstances concur here.

*Secondly*, if this was not a mere question of property, it was a prize question, and the admiralty of Ireland has no prize jurisdiction, and so it was lately determined.

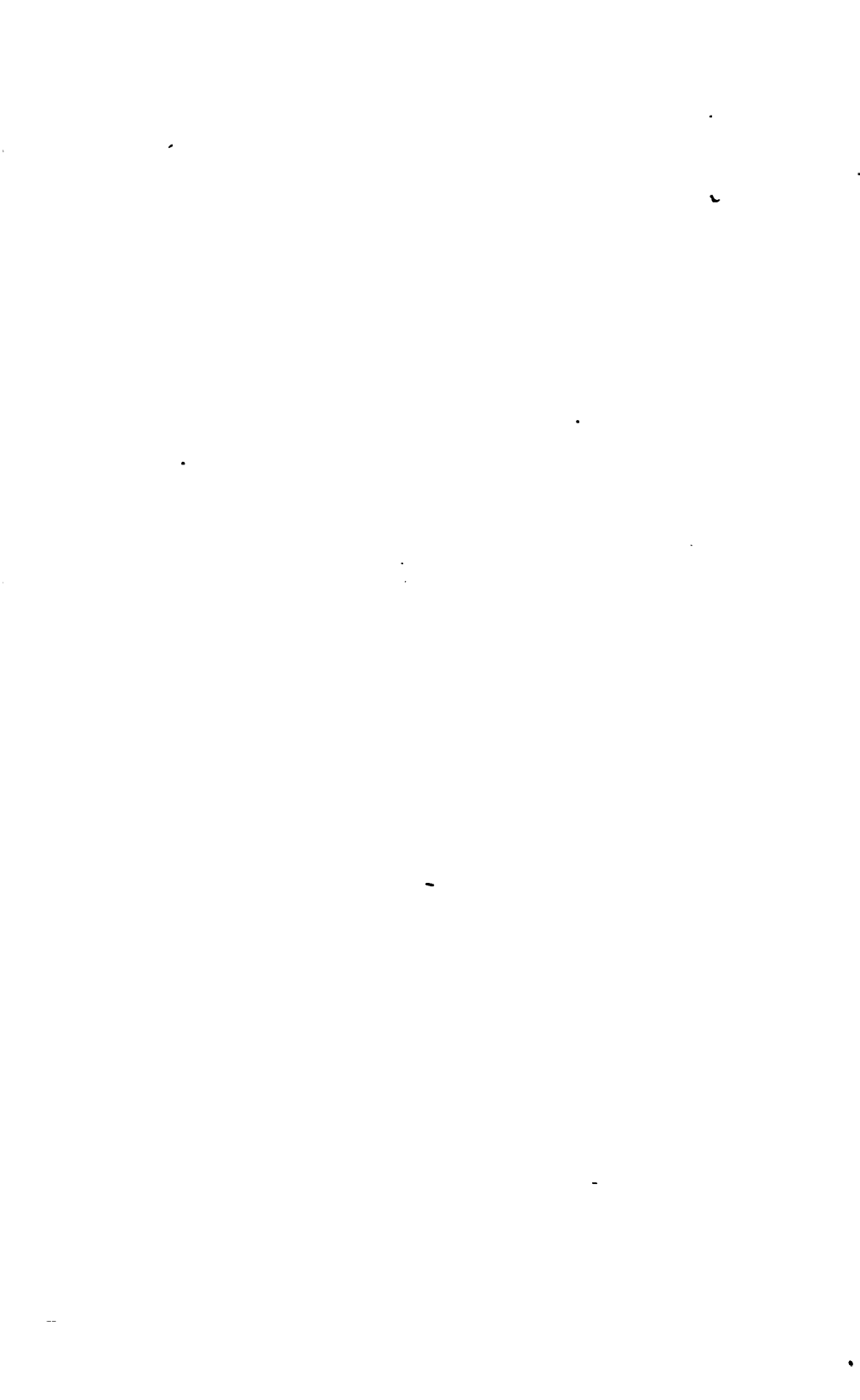
That as to the court not being competent to decide on the legality of the French consulage court in Denmark, it was not called upon to do so ; but if it was, and it should be answered, that the question of the sale was inseparably connected with that of the capture, and brought the latter and

the jurisdiction of the court in Denmark necessarily before the court, it did so collaterally and incidentally, and the court of king's bench has full authority to judge of the jurisdiction of foreign courts of admiralty, as it doth every day in questions of insurance: that the court of admiralty had no concurrent jurisdiction in such a case as this, nor could a single authority be adduced to shew it had, or had ever tried such a cause; and as to counsel not producing modern cases to support their argument, the reason was, that in modern times no one had ever thought of setting up such a jurisdiction.

That in Sir Leoline Jenkins's Letters, (and no higher authority can be cited as to matters of the admiralty) 2 vol. p. 734, is a case of a French privateer taking a Dutch vessel, and bringing her into the port of Youghal in Ireland, where the high court of admiralty condemned her, and she was sold; on which occasion, though that great judge denies the authority of the Irish court of admiralty to entertain that cause, yet says he, "I do not see how the purchaser can be ousted of his possession, for more than probable the bargain was made between the buyer and the privateer *upon the land*, and consequently the cognizance of the validity of it will be prohibited to the admiralty, and if a verdict at common law shall find the sale to be a good sale, the claimant will be without remedy."

The court granted the prohibition, and that (on account of the very special circumstances) upon the last day of term.

N. B. I apprehend there can be no doubt this was a prize question.



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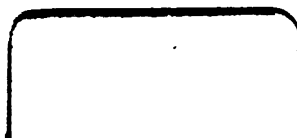




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